Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 185

WAGNER IRON WORKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO); AND BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BYRNE-HARPER PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner Wagner Iron Works respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit entered April 14, 1955 enforcing against your petitioner an order of the National Labor Relations Board dated April 28, 1953, insofar as the decree directs reinstatement with back pay of 64 former employees of the petitioner.

CITATIONS TO OPINIONS BELOW.

The Intermediate Report of the Trial Examiner is unreported and is printed in "Appendix to N.L.R.B. Brief"[1] in the Court of Appeals, at pp. 55-145. The Opinion of the National Labor Relations Board, which is part of its Decision and Order, is reported at 104 N.L.R.B. 445, and is also printed in the record below at B. A. pp. 169-180. The Opinion of the Court of Appeals, Appendix B hereto, appears at 220 Fed. (2d) 126. A Petition for Rehearing in that Court was denied without opinion on April 5, 1955 (Appendix C hereto). Petitioner filed a motion in the Court below that entry of a decree be held in abeyance or stayed pending the ruling of the Supreme Court of the United States in *NLRB* v. *Mastro Plastics Corp.*, 214 Fed. (2d) 462 (C. A. 2), certiorari granted Jan. 10, 1955, United States Supreme Court Docket No. 454, October Term, 1954, or in the alternative if a decree was entered by the Court of Appeals, enforcement of the decree be stayed pending the ruling of this Court in the *Mastro Plastics* case (Appendix D hereto). The Court below denied that motion without opinion by order entered April 14, 1955 (Appendix E hereto).

JURISDICTION.

The Decree of the Court of Appeals was entered April 14, 1955 (Appendix A hereto), after denial of a Petition for Rehearing (Appendix C hereto). The jurisdiction of this Court is involved under 28 U. S. C. Sec. 1254(1); 62 Stat. 928.

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1. Hereinafter cited as "Board Appendix" or "B. A." Petitioner's Appendix below will be cited as "Wagner Appendix" or "W. A."

QUESTIONS PRESENTED.

1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act (which bars from the remedial processes of the Act employees who strike during the "cooling-off" period preceding termination of a collective bargaining contract) applies to "unfair labor practice" strikers who strike during the "cooling-off" period.

2. Whether employees discharged for breaching a covenant in their collective bargaining contract prohibiting "any strike", by striking during the term of the contract, may be ordered reinstated by the National Labor Relations Board.

3. Whether the National Labor Relatios Board may order reinstatement of strikers whose contract of employment provided that the contract grievance and arbitration procedure *"shall be the sole means of disposing of grievances."*

STATUTES INVOLVED.

As to *Question 1,* the statutory provision involved is Section 8(d) of the Labor Management Relations Act, 29 U. S. C. Secs. 151, 158(d) 60 Stat. 136, 140, hereinafter referred to as the *"Act"*. The text is:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

"The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in

a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer."

As to Question 2, the statutory provision involved is Section 13 of the National Labor Relations Act as amended, 29 U. S. C. Sec. 163, 61 Stat. 151. The text is:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

STATEMENT OF FACTS.

The petitioning employer, Wagner Iron Works, is a Wisconsin corporation located at Milwaukee, Wisconsin where it operates a metal fabricating plant. In May-June, 1951, when the events involved in this case occurred, the Company had had over 14 years of peaceful and satisfactory relations with its employees and their exclusive collective bargaining representative, the Respondent AFL Union (Board Appendix 62, 891; Wagner Appendix 200). During those 14 years, the Company had entered into a series of collective bargaining contracts with that AFL Union as the exclusive bargaining agent for the Company's employees (B. A. 62). The latest contract was dated July 1, 1950 to expire June 30, 1951 (Contract, Sec. 18, Bd. Exh. 6, W. A. 185, 194).

The contract contained the following covenant prohibiting strikes, picketing and lockouts during the term of the contract:

"B. The Union agrees that neither it nor its members, individually or collectively, will, during the term of this agreement, cause, permit, approve or take part in any strike, picketing, sit-down, stand-in, slow-down, or other curtailment or restriction of production or interference with work in or about the Company's plant or premises." (Bd. Exh. 6, Sec. 15, B; W. A. 191.)

"G. The Company shall not engage in any lockout of the employees." (Sec. 15, G; W. A. 193.)

On April 5, 1951, the AFL Union gave notice of the termination of the contract as of June 30, 1951, and of its desire to negotiate a new contract. Sometime in April or May, 1951, one Chiakulis, a UAW-CIO organizer, sought to have his CIO Union displace the AFL Union at the Wagner plant (B. A. 66-7, 208-210, 223). Chiakulis declared "war" on the AFL Union (W. A. 64). The petitioner's plant became a battleground between the two unions. Both unions filled the plant with posters, bulletins, stickers and literature; many employees took considerable working time for the campaigning and much strife ensued; production at the plant declined and the Company suffered (W. A. 52-3, 62-3, 89-90, 92-3, 155-160, 175-177).

In an effort to avoid involvement in the unions' war, the Company proclaimed its neutrality by written announcement to all its employees on June 6, 1951 (Bd. Exh. 10, B. A. 893).

The Company discharged two employees (Gould and Steffes) for drunkenness on the job on May 26, 1951 (B. A. 238-41; W. A. 21-5, 30-1, 122-5, 151-5), and discharged two employees, the McMahon brothers, on June 4, 1951, for one punching the other's timecard in violation of a Company rule (W. A. 76). The Company, after consulting with the AFL Union (W. A. 164-5) on June 4, 1951, laid off 22 of its 55 night shift employees to reduce its inefficient and expensive night shift operation and to increase its more efficient

and less expensive day shift operation (W. A. 129-30, 145-9, 162-5).

The discharged and laid-off employees were all members of the AFL Union, were parties to the aforementioned labor contract, and were bound by its terms. If they wanted to question the propriety of the discharges and layoffs, they had a right to invoke the grievance and arbitration procedure of the contract, but none of them did (W. A. 61-2, 68-9, 107). Under the contract, the grievance and arbitration procedure was the *sole* remedy (Contract, Sec. 15 A, Bd. Exh. 6, W. A. 191).

The AFL Union did seek to invoke the contract grievance and arbitration procedure for the benefit of the discharged and laid-off men (W. A. 87), and the Company was willing to consider any grievances with either the AFL or the CIO grievance committees and to arbitrate (B. A. 485, 833; W. A. 86-7, 90-1, 139, 142-4). CIO organizer Chiakulis, however, refused and said, "We don't want to arbitrate—we are going to pull an unfair labor practice strike" (W. A. 143; B. A. 485; W. A. 87).

On June 19, 1951, Chiakulis called a strike meeting. Next morning, June 20th, about 70 of the employees went out on strike and picketed the Company's plant for seven days (B. A. 97).

Pursuant to the contract provision requiring the AFL Union to call off an unauthorized strike (Contract, Sec. 15, E, W. A. 193), the AFL Union sent a letter to all the striking employees ordering the strikers to return to work or they would be discharged; and telling them that the grievance and dispute would be processed through the regular grievance procedure provided by the contract. The letter read as follows:

"International Association of Bridge, Etc. Workers, Local Union 471 (AFL)

June 20, 1951.

Bulletin Board Notice.

To all Members of Shopmen's Local Union No. 471 of the International Association of Bridge, Structural and Ornamental Iron Workers:

You are advised that certain action took place today in this plant. This action was unauthorized by both the Local and International Union.

You are directed to promptly return to your respective jobs and to cease any action which may affect production. The grievance in dispute will be processed through the regular grievance procedures provided for in your contract.

If conditions do not return to normal immediately, we feel that the Company is justified is permanently replacing you with new employees.

Fraternally yours,

(Signed by three officers of the Union.)"

(Bd. Exh. 27; B. A. 910, 97.)

The strikers refused to return to work, so the Company sent them all a letter dated June 22, 1951, discharging them for striking and picketing. The letter read as follows:

"June 22, 1951.

Pursuant to Section 15 of our contract with the International Association of Bridge, Structural, and Ornamental Iron Workers Union, Local No. 471, you have been notified by Local 471 that the strike action was unauthorized by both the Local and International Union, and that such strike is contrary to the non-strike provision of our existing collective bargaining agreement.

You were directed to promptly return to your job and to cease any action which may have affected our production. You were further notified that if conditions did not return to normal immediately, the Union deemed the Company justified in permanently replacing you with new employees.

Therefore, pursuant to the terms of our collective bargaining agreement, you are hereby notified that your employment with this company is terminated.

WAGNER IRON WORKS."

(B. A. 98; Bd. Exh. 19, B. A. 901.)

In addition to the no-strike covenant, the labor contract also contained detailed provisions covering the rights and duties of the parties on many matters, including the following:

1. "*Section 3.* The Company recognizes the Union as the exclusive representative and agent of all of the Company's production and maintenance employees * * *" (Contract, Bd. Exh. 6, W. A. 186).

2. A union security clause (Contract, Sec. 4, W. A. 186).

3. Detailed provisions covering working hours, overtime pay, holiday pay, wages, wage classifications, call-in pay, seniority rights, promotions, vacation pay (Contract, Secs. 5-12, 17; W. A. 187-190, 193).

4. A detailed grievance procedure providing:

"(C) Should any grievance arise between the Company and the Union, or between the Company and an employee or employees involving the meaning, application or interpretation of this agreement, an earnest effort shall be made to settle such grievance in the following manner:

Step 1. By the complaining employee, Shop Steward and Squad Leader. If not settled,

Step 2. By the Shop Committee, Shop Superintendent for the Company and/or his designated representatives. If not settled,

Step 3. By a representative of the Union, the Shop Committee and the Plant Manager for the Company and/or his designated representatives." (Contract, Sec. 13, C; W. A. 190.)

5. A detailed arbitration procedure providing:

"*Section 14.* Any difference or dispute between the

Company and the Union, or between the Company and an employee or employees, which has not been satisfactorily settled in accordance with the provisions of the preceding section of this agreement shall, upon the written request of either party to this agreement, be submitted to arbitration by an impartial arbitrator to be selected by mutual agreement of the parties. In the event the parties are unable, within five (5) days after such request, to agree upon an arbitrator, the Director of the Federal Mediation and Conciliation Service shall be requested to select an impartial arbitrator, and the selection so made shall be equally effective as if the selection had been made directly by the parties * * * the decision of the arbitrator shall be final and binding upon the parties, if within the jurisdiction conferred by this agreement, and judgment thereon may be entered in any court having jurisdiction. The compensation and necessary expenses of the arbitrator shall be borne equally by the Company and the Union." (Contract, Sec. 14; W. A. 190-1.)

6. The parties agreed

"that the grievance procedure provided herein is adequate to provide a fair and final determination of all grievances that may properly arise under the terms of this agreement, and shall be the sole means of disposing of grievances. It is the desire of the Company and the Union to avoid strikes and work stoppages and lockouts." (Contract, Sec. 15, A; W. A. 191.)

7. The discipline and discharge clause provided:

"(C) If the Company shall discipline or discharge any employee or employees who shall engage in conduct hereby prohibited, such discipline or discharge shall not be subject to review upon any ground other than that the employee did not engage or take part in such conduct. Such discipline or discharge shall be imposed within seven (7) working days after such violation has terminated; otherwise, such discipline or discharge shall be subject to the regular grievance procedure." (Contract, Sec. 15, C; W. A. 192.)

The Company declined to reinstate the discharged strikers. No arbitration was instituted upon the Company's discharges. Instead, between May 31 and July 5, 1951, the CIO's Chiakulis filed with the Board a series of unfair labor practice charges against the Company and the AFL Union.

The Company, by its Answer, denied all the charges of unfair labor practices; invoked the no-strike and no-picketing provisions of the labor contract; alleged that the strike and the picket line was to force the Company to recognize the CIO Union instead of the AFL Union which had been certified as the exclusive bargaining representative of the Company's employees; and that the CIO was, therefore, engaged in unfair labor practices under Sec. 8(b)(4)(c) of the Act (B. A. 38-41). The AFL Union, by its Answer, also denied the CIO's unfair labor practice charges (B. A. 45-53).

Chiakulis' unfair labor practice charges were prosecuted by the Board. The Board overruled the Company's defenses and the lower court sustained the Board. The petitioner Wagner Company's defenses now in issue are:

(1) That the strikers lost their status as employees by striking within the cooling-off period prohibited by Sec. 8(d) of the Act;

(2) That their strike in breach of the no-strike covenant of the labor contract was not a protected activity;

(3) That under the labor contract the grievance and arbitration procedure was the sole means of disposing of grievances; and

(4) That, therefore, the National Labor Relations Board has no jurisdiction or power to order reinstatement of the strikers with back pay.

The jurisdiction of the Board to entertain the unfair labor practice charges was grounded upon petitioner being engaged in interstate commerce.

The Court of Appeals for the 7th Circuit entertained the Petition of the Board for enforcement of the Board's Order under Section 10(3) of the National Labor Relations Act, the petitioner being engaged in business within that Circuit (B. A. 2).

Regarding the "loss of status" defense, the Board, overruling that defense, held (B. A. 174) that "* * * Section 8(d) applies only to strikes to terminate or to secure modification or interpretation of the collective bargaining contract, and not to an unfair labor practice strike, as this was."

Regarding the breach of contract defense, the Board, relying on its decision in *Mastro Plastics Corp.*, 103 NLRB No. 51, held that the strike was not a breach of the no-strike covenant of the contract (B. A. 173).

The Court of Appeals sustained the Board on both points (220 Fed. (2d) 126, at 140-141; Appendix B, *infra*, pp. B-20-22).

REASONS FOR GRANTING THE WRIT.

I. THIS CASE PRESENTS EXACTLY THE SAME QUESTIONS AS A CASE NOW PENDING BEFORE THIS COURT.

This case involves exactly the same questions as *Mastro Plastics Corp.* v. *NLRB*, No. 454, Oct. Term, 1954, in which this Court granted the employer's petition for a writ of certiorari on January 10, 1955. That case is still to be argued. The *Mastro Plastics* case presents two questions: (1) Whether the "loss of status" provision of Sec. 8(d) of the Labor Management Relations Act applies to "unfair labor practice" strikers who strike during the "cooling-off" period provided by Sec. 8(d) of the Act; and (2) whether employees who strike against their employer's alleged unfair labor practices during the term of a labor contract containing a covenant against "any strike" may be ordered reinstated by the Board.

The instant case involves the same questions. Therefore, it is respectfully suggested that the same reasons which moved this Court to grant certiorari in the *Mastro Plastics* case should equally move the Court to grant certiorari in this case. The Court could order the two cases to be argued together.

Allowance of certiorari in this case is particularly important in view of the lower Court's denial (Appendix E hereto) of Petitioner's Motion (Appendix D hereto) for stay of the decree sought to be reviewed here, pending the ruling of this Court in the *Mastro Plastics* case. For if this Court reverses the *Mastro Plastics* case it would necessarily mean an opposite construction of Section 8(d) of the Labor Management Relations Act and of the no-strike covenant in labor contracts by this Court from the con-

struction adopted by the lower Court. But if certiorari here were denied, the Petitioner would be faced with a clearly erroneous decree and yet might be left without remedy—an injustice which the Petitioner should not be required to bear, and which no court should tolerate.

II. AS TO THE "LOSS OF STATUS" QUESTION.

By Section 8(d) of the Labor Management Relations Act, Congress sought to encourage the settlement of industrial disputes by collective bargaining and to discourage strikes. For that reason, Congress prohibited resorting "to strike or lockout for a period of sixty days after such notice is given or the expiration date of such contract, whichever occurs later." (Act, Section 8(d)(4).) The Congressional mandate regarding the "loss of status" question (Sec. 8(d) of the Act, last sentence) provides:

> "* * * Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Secs. 8, 9 and 10 of this Act as amended * * *"

The statute is based upon the hope that uninterrupted negotiations during the prescribed cooling-off period, with the help of Federal and State conciliators, will produce agreement without the need for costly, destructive industrial strife. The statute is of the utmost importance. It recognizes the importance of men living up to their contractual obligations. Section 8(d) of the Act makes no distinction between types of strikes and lockouts which are prohibited during the "cooling-off" period. The statutory mandate is short, plain and explicit—it prohibits *all* strikes during the term of a labor contract. There is no exception in favor of "unfair labor practice" strikes. An employer's alleged unfair labor practices are, therefore, no justification for overriding the statutory command prohibiting *all* strikes during the term of a labor contract.

A strike, whether it be under the name of "unfair labor practice" or under any other name, is economic warfare. Surely forbidding strikes during a 60-day cooling-off period or during the term of a labor contract, whichever is later, is not only reasonable but eminently desirable. By Section 8(d) of the Act, Congress clearly recognized that the right to work is quite as sacred as the right to strike.

Congress proscribed strikes on a *time* standard rather than by their *objective.* There are sound reasons why Congress made the loss of status provision applicable to "any" striker who strikes within the proscribed *time period,* rather than to base the application of the statute upon the *objective* of the strike.

The Labor Management Relations Act of 1947 was no ivory tower enactment. Congress had before it the realities of the industrial world and the havoc strikes caused not only to employees and employers but also to the general public. Congress presumably knew what all well-informed persons knew—that many strikes were unwarranted; that many strikes were useless; that many strikes were called to promote controversy, strife and class warfare; that many strikes were called to test the power of unions and union officials; that many strikes accomplished nothing; and that many strikes made matters worse than before. Congress, therefore, regarded it as reasonable and essential to require an existing labor contract to be continued without strike or lockout *for any cause,* until at least the expiration date of the contract. Such requirement is consistent with the stated Congressional declaration that the purpose and policy in enacting the Act was to avoid industrial strife. 29 U. S. C. Sec. 141 (b).

Furthermore, a *time* standard is readily ascertainable by those expected to observe it. On the other hand, the standard of conduct proposed by the Board and the Court

below, based upon the *objective* of a strike, is one presenting a host of doubts—ifs, ands, buts, fact questions, law questions, credibility questions—all difficult to determine by both employers and employees who must comply, or face perilous consequences. The standard adopted by the Court below defeats the Congressional policy by permitting the drumming up of non-contract strike issues to evade the purpose of Section 8(d) of the Act.

In the case at bar, the strikers were squarely within the statute prohibiting their strike. However, the Board and the Court below would limit the scope of the statute so as to exclude strikes called for alleged "unfair labor practices" of the employer; and they both held that the strikers did not come within the statutory mandate.

To exclude "unfair labor practice" strikes from the statutory prohibition, is to defeat the very purpose of the statute. The lower court's construction renders utterly meaningless the following eleven words in Section 8(d)(4) of the Act:

> "• • • or until the expiration date of such contract, whichever occurs later."

At least three Courts before whom this question arose have held that Section 8(d) of the Act makes it unlawful for employees to strike during the term of an existing labor contract, even in absence of any no-strike clause in the labor contract:

(a) *Local No. 3* v. *NLRB*, 210 Fed. (2d) 325, 332-3 (C. A. 8, 1954); cert. denied, 348 U. S. 822;

(b) *United Packinghouse Workers* v. *Wilson & Co.*, 80 Fed. Sup. 563, 569;

(c) *Boeing Airplane Co.* v. *NLRB*, 85 U. S. App. D. C. 116, 174 Fed. (2d) 988, 990.

In the *Local 3* case, the 8th Circuit Court said (210 Fed. (2d) 325, 332):

"It (Sec. 8(d)(4)) is not ambiguous and cannot be amended by interpretation";

that *the definite purpose of Section 8(d)(4) was to prohibit strikes during the life of a contract;* that by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees and hence were not entitled to reinstatement.

In order to prevent strikes during the 60-day cooling-off period and during the term of a labor contract, Congress provided a sanction—the loss of status provision in Section 10, applicable to all employees covered by the labor contract. It penalizes men for breaking their contracts by providing a forfeiture of employment status to those employees who strike in violation of their contract not to strike.

The importance of the question which this Petition asks this Court to review is evident. An important Congressional mandate has been amended by interpretation by both the Board and the Court of Appeals so as to legalize strikes called within the period prohibited by the plain language of the statute. The dissent of the Board members in *Mastro Plastics* case, 103 NLRB 511, 520, pointed out that to exclude unfair labor practice strikes from the coverage of the statute is an "amendment" destructive of the Congressional mandate. And the Board itself, a year after its decision in this case, abandoned its *Mastro Plastics* case doctrine in *Lion Oil Co.*, 109 NLRB No. 106 (1954), where it held that Section 8(d)(4) of the Act was unambiguous and prohibited a strike during the term of a union labor contract.

Though the Board and the lower Court have held the strike to be an "unfair labor practice" strike, actually the strikers had mixed motives for striking (Examiner's

Report, B. A. 97). Many strikes involve not merely economic issues, but are of mixed motivation.[2] The lower Court's decision is destructive of the Congressional policy by introducing into a simple law the vague and imponderable phrase "unfair labor practice" and would thus gradually erode the statute to a futile thing.

An authoritative resolution of the question involved in this case by this Court is of the utmost importance to millions of people. The risk to an employee in deciding whether to strike is a serious matter. Whether he can do so under the protection of the Act, as the Board contends in this case, or without the protection of the Act, as the literal mandate of the Act provides, is a question of great importance to him. No less serious is the problem to the employer. He must make a choice of either closing his plant when a strike occurs; or replace the strikers and take the chance of later having to discharge the new workers in order to reemploy the strikers in their place, plus the penalty of large back pay to the strikers who did no work to earn it. The number of employees under the hazard of having to make such a decision runs into the millions; the number of employers in the thousands.[3] And the problem is a recurring one; for their contractual relationships are recurrent. Chairman Farmer of the Labor Board dissented from the majority's refusal

2. In 1952 there were 403 "Recognition Strikes", 41 "Strengthening of Bargaining Position Strikes", 35 "Discrimination Strikes", 59 "Other Union Organization Strikes", 67 "Sympathy Strikes", 79 "Union Rivalry or Factionalism Strikes", 181 "Jurisdictional Strikes", 3 "Union Regulation Strikes", and 4 "Other Interunion or Intraunion Strikes"; a total of 872 strikes not involving strict economic issues. The number of recorded strikes was 5,117. *Monthly Labor Review*, May 1953, Vol. 76, p. 508.

3. In 1952 more than 3½ million employees were involved in strikes. 59 million man-days were lost. There were 5,117 work stoppages, some of them involving more than one employer. *Monthly Labor Review*, May 1953, Vol. 76, p. 508.

to grant reconsideration of this case because he thought "There are important issues of law raised by this motion" (B. A. 203).

Another reason for granting this petition is that there is a direct conflict between the case at bar and the decision of the 8th Circuit in *Local 3* v. *NLRB*, 210 Fed. (2d) 325 (1955), *certiorari denied*, 348 U. S. 822.

In the opinion below (at 220 Fed. (2d) 141), the 7th Circuit followed *NLRB* v. *Mastro Plastics Corp.*, 214 Fed. (2d) 462 (C. A. 2, 1955). In the *Mastro* case, the 2nd Circuit majority had this to say about *Local No. 3* case (at 214 Fed. (2d) 466):

> "In *Local No. 3, etc.* v. *National Labor Relations Board*, 8 Cir., 210 F. 2d 325, it was held that the employer had not been guilty of an unfair labor practice in the discharge of employees. It was, accordingly, not an unfair labor practice strike. Perhaps that serves to distinguish that case from this, but, if not, we find ourselves in respectful disagreement."

The problem in the *Local 3* case was whether employees who engaged in a wage strike more than sixty days after service of the modification notice, but before the expiration date of the contract, lost their status as employees under the Act. The *Local 3* contract contained a wage reopening clause but lacked a "no-strike" clause. The Board[4] held that the strikers did not lose status. To arrive at this result, the Board narrowed the construction of Section 8(d) to "strikes designed to secure termination or modification of collective bargaining agreements", and argued that a construction which would, in effect, "write a no-strike clause into every contract" would be destructive of this purpose.

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4. *Sub. nom. Packinghouse Workers, CIO (Wilson & Co.)*, 89 NLRB 310.

The 8th Circuit flatly rejected this construction of Section 8(d), saying:

> "Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof."

The 2nd Circuit's holding is in direct conflict with the decision of the 8th Circuit. Now the 7th Circuit in the instant case followed the 2nd Circuit's decision.

III. AS TO THE BREACH OF CONTRACT QUESTION.

What we have said about the lower Court's unwarranted interpretation of Section 8(d) of the Labor Management Relations Act applies with equal force to the Court's misconstruction of the no-strike clause of the labor contract. The employees and their AFL Union contracted that during the term of the contract they would not engage in "any strike, picketing * * * or other curtailment or restriction of production or interference with work" (Contract, Sec. 15, B, W. A. 191). The company agreed "not (to) engage in any lockout of the employees" (Contract, Sec. 15, G, W. A. 193). The employees and their union agreed by the no-strike covenant of the contract not to engage "in *any* strike". "*Any* strike" obviously includes *all* strikes, whether labeled "unfair labor practice strikes" or any other kind of strike. The labor contract did not except "unfair labor practice" strikes but prohibited *all* strikes without exception. It would be absurd to put that exception into a contract when the very purpose of parties writing a no-strike and no-lockout covenant into a contract is to prohibit them altogether during the term of the contract. The most important consideration to an employer in signing a labor contract is to have assurance that he will be free from strikes during the

term of the contract. While employers readily agree in a labor contract to refrain from committing unfair labor practices, they would hardly be willing to allow their employees to "adjudicate" such an issue one-sidedly, by striking.

There is no finding by the Board or the lower Court that the Company breached the labor contract, and there could not be for the Company abided by the contract.

The parties themselves knew what they intended by their contract. The Company's Vice President, Mr. Werner, regarded the contract grievance procedure and arbitration as binding for the settlement of the dispute concerning the discharges and the layoff. He offered to abide by the grievance and arbitration procedure and even to recognize a CIO grievance committee (B. A. 485, 833; W. A. 86-7, 90-1, 139, 142-4). The AFL Union, as exclusive contracting agent of all the employees, also recognized the exclusiveness of the grievance and arbitration procedure as the sole remedy for the settlement of the dispute, ordered the strikers to return to work and advised them:

> "The grievance in dispute will be processed through the regular grievance procedure provided for in your contract" (Bd. Exh. 27, B. A. 910).

Hence, both parties to the contract recognized the grievance and arbitration procedure as the *exclusive* method for the settlement of the dispute concerning the discharge of Steffes, Gould and the McMahons, and the layoff of 22 of the night shift employees.

Nevertheless the Board and the Court below ignored the construction the parties to the contract placed upon their own contract, and held that the labor contract was not intended to cover "unfair labor practice" questions. This was in violation of a well-settled rule of law, that even in case of doubt, the construction parties place upon

their own contract is of great or controlling weight. 12 Am. Jur. 789.

Furthermore, if you disregard the legal conclusion that the facts as found by the Board constituted "unfair labor practices" by the employer, and compare the Board's findings of fact with the contract coverage, you will note that the contract dealt with every one of the Company's acts "found" to be an "unfair labor practice".

While the no-strike covenant prohibited "*any* strike" during the term of the contract, the Board and the Court below added as an exception, "except unfair labor practice strikes." They were no more empowered to add an exception to the contract by "construction" than they had the power to amend Section 8(d) of the Act by "construction".

In refusing to uphold the no-strike covenant of the contract, the Court of Appeals has departed from the accepted and usual course of judicial proceedings of enforcing valid contracts. The labor contract here involved was made and was to be performed in Wisconsin. Presumably the law of Wisconsin applied. Wisconsin has had an "Employment Relations Act", also called "Employment Peace Act", since 1939, governing the rights and duties of employers and employees in industrial relations (1953, Wis. Stats., Chap. 111). That Wisconsin statute provides:

> "It shall be an unfair labor practice for an employe individually or in concert with others • • • To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)." Wis. Stats., Sec. 111.06(2)(c).

If Wisconsin contract and statutory law applies here, as we think it should, it is clear that the lower Court departed from the usual course of judicial proceedings in failing to consider the terms of the labor contract.

The lower Court's ruling is squarely contrary to the 7th Circuit's earlier rulings where that Court upheld no-strike covenants in labor contracts. See:

NLRB v. *Columbian E & S Co.*, 96 Fed. (2d) 948 at 953-4 (C. A. 7, 1938), affirmed 306 U. S. 292;
United Biscuit Co. v. *NLRB*, 128 Fed. (2d) 771 at 775 (C. A. 7, 1942).

The ruling below is also in conflict with applicable decisions of this Court on this point. This Court has held that the employer's alleged unfair labor practices did not justify a strike in violation of a no-strike covenant in a labor contract.

NLRB v. *Sands Mfg. Co.*, 306 U. S. 332, 344;
Consolidated Edison Co. v. *NLRB*, 305 U. S. 197, 235-238.

A fundamental rule of contract law is that men may make reasonable agreements not to compete, or to restrict their employment, for limited periods. There is no reason in law or morals why employees should not have the lawful right to waive or forego their right to strike for a limited period. If by such waiver they can get industrial peace, it is greatly to their benefit to do so. Why the Board or any court should rule otherwise is difficult to understand. Americans have been brought up on the principle of sanctity of contracts. Indeed sanctity of contract is the very cornerstone and bulwark of a free society. Without sanctity of contract, our whole economic and industrial society and our social system would disintegrate and collapse. The very warp and woof of our society is based upon performance of contractual obligations.

The error of the lower Court in holding that a no-strike covenant in a labor contract is inoperative against "unfair labor practice" strikes should be reviewed by this Court for a number of reasons. The matter is of the ut-

most importance in connection with the construction of Section 8(d)(4) of the Labor Management Relations Act. It is important to millions of employees and tens of thousands of employers whenever they sit down to negotiate their labor contracts. It is important because there underlies the issue the basic question whether the law governing no-strike, no-lockout covenants in a labor contract is the law of the state where the contract is made and is to be performed, or whether it is the Labor Management Relations Act, only several aspects of which have been decided by this Court.[5]

The Board itself has been shuttling back and forth on this question. In *National Electric Products*, 80 NLRB 995, 1000 (1948), the Board held that the right to strike, though protected by the Act, may be waived by employees by a no-strike clause in their labor contract; that unfair labor practices committed by the employer were no defense for striking; that the strikers were, therefore, properly discharged. In the *Mastro Plastics* case, 103 NLRB 511, 513 (1953), the majority of the Board (two members dissenting) held the no-strike clause in the labor contract did not waive the right to strike against the employer's unfair labor practices. In the instant case, the Board followed the *Mastro Plastics* case instead of the *National Electric Products* case. But later, in *Lion Oil Co.*, 109 NLRB No. 106 (1954), the Board seemingly abandoned the doctrine of the *Mastro Plastics* case.

Authoritative resolution of the question by this Court is, therefore, eminently desirable and necessary.

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5. *Garner* v. *I. B. T.*, 346 U. S. 485; *Amalgamated C. W. of A.* v. *Richman Bros.*, 348 U. S. 511, 99 L. Ed. 422 (Adv. Op., April 4, 1955).

IV. AS TO ARBITRATION BEING THE SOLE REMEDY.

There is an additional point here which is not involved in the *Mastro Plastics* case. The labor contract here involved provided that the contract grievance procedure was adequate to provide fair and final determination of all grievances which arise under the contract, "and shall be the sole means of disposing of grievances" (Contract, Sec. 15A, W. A. 191).

The parties to the contract knew what they intended by their own contract. Both the Company and the AFL Union, as exclusive contracting agent for the employees, recognized the exclusiveness of the grievance and arbitration procedure as the sole remedy for the settlement of the dispute. The AFL Union ordered the strikers to return to work, and advised them that "the grievance in dispute would be processed through the regular grievance procedure provided for in your contract" (Bd. Exh. 27, B. A. 910). The contract, therefore, prohibited the filing of the unfair labor practice charges against the Company and the Board had no jurisdiction to entertain the unfair labor practice charges prior to at least *attempted* settlement by arbitration.

In addition, Wis. Stats. (1953), Sec. 111.06(2)(c) makes it an unfair labor practice for an employee to refuse to arbitrate. If Wisconsin law applies here, and we think it should, the arbitration provision in the labor contract was specifically enforceable. That is the law in Wisconsin. *Dunphy Boat Corp.* v. *WERB*, 267 Wis. 322, 64 N. W. (2d) 866 (1954). Recent decisions of this Court are to the same effect.[6]

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6. *Slocum* v. *Delaware Railroad Co.*, 339 U. S. 239; *Order of Railway Conductors* v. *So. Ry. Co.*, 339 U. S. 255. See also *Lewellyn* v. *Fleming*, 154 Fed. (2d) 211, 213 (C. A. 10); *Edmonds* v. *Grand Brotherhood*, ... Mich. ...., 65 N. W. (2d) 736; *Preble* v. *Architectural Union*, 260 Ill. App. 435; *Fields Baking Corp.* v. *Bakery Union*, 73 N. Y. S. (2d) 518.

Therefore the arbitration procedure was the sole remedy and the National Labor Relations Board had no jurisdiction or power to order reinstatement of the strikers.

CONCLUSION.

The holdings below involve such basic features of the Labor Management Relations Act and of collective bargaining contracts, and of conflict between state and federal law, and affects so many employers and employees and indeed the whole public, that review by this Court is necessary and warranted. The writ of certiorari should issue as to all three questions herein.

Respectfully submitted,

MORRIS KARON,
Counsel for Petitioner,
710 No. Plankinton Avenue,
Milwaukee 3, Wisconsin.

Dated at Milwaukee, Wisconsin, June 20, 1955.

APPENDIX A.

Decree Sought to Be Reviewed.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, *vs.* WAGNER IRON WORKS and BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471, AFL, *Respondents.*	No. 11121.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner*, *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 11141.

Entered, April 14, 1955.

DECREE ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

This cause came on to be heard upon the petition (No. 11121) of the National Labor Relations Board to enforce its order dated April 28, 1953, and upon the petition (No. 11141) to review and set aside that portion of the Board's said order which dismisses a certain portion of

the complaint. The Court heard argument of respective counsel on December 2, 1954, and has considered the briefs of the parties filed in this cause. On March 7, 1955, the Court, being fully advised in the premises, handed down its decision enforcing the Board's order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that:

A. The Respondent, Wagner Iron Works, a Corporation, (hereinafter called Respondent Company), Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation or administration of or contributing financial or other support to the Temporary Committee, The Independent Union, or any other labor organization;

(b) Contributing financial or other support to Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL), or to any other labor organization;

(c) Recognizing the Temporary Committee, should it be revived, or the Independent Union, or any successor thereto as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(d) Recognizing Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and performing or giving effect to any contract with Local 471, or any successor thereto, unless and until Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) shall have been certified as such representative by the Board;

(e) Discouraging membership in UAW-CIO, or encouraging membership in Local 471, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment;

(f) Engaging in surveillance of its employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended (hereinafter called the Act).

(g) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist UAW-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Withdraw all recognition from, and completely disestablish, the Temporary Committee should it be revived, and the Independent Union, as the representative or representatives of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(b) Withdraw all recognition from Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes,

wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said Local 471 shall have been certified as such representative by the Board;

(c) Offer to Gust John Gould, Jacob Steffes, Roy McMahon, Don McMahon, Wesley Bajanen, Ervin Kusz, and Alexis Sobczak, and to the 57 employees whose names are listed in Appendix A hereto, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by payment to each of them a sum of money equal to the amount each normally would have earned as wages from the date of said discrimination to the date of the offer of reinstatement, less his net earnings during said period, said back pay to be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289;

(d) Post at its plant at Milwaukee, Wisconsin, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region of the National Labor Relations Board, Chicago, Illinois, shall, after being duly signed by Respondent Company's representative, be posted by Respondent Company immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps the Respondent Company has taken to comply herewith.

B. The Respondent, Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining and coercing employees of Respondent Company, its successors and assigns, in the exercise of the rights guaranteed them in Section 7 of the Act by threatening to request their discharge for failure to pay dues to it, except as provided in Section (8) (a) (3) of said Act as amended;

(b) Causing or attempting to cause the Respondent Company, its successors and assigns, to discriminate against employees in violation of Section 8 (a) (3) of the Act;

(c) In any other manner restraining or coercing employees of Respondent Company, its successors and assigns, in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Make whole Don McMahon and Roy McMahon for any loss of pay suffered by them by reason of the discrimination against them, in the manner set forth in the Decision and Order dated April 28, 1953.

(b) Post in conspicuous places in its offices in Milwaukee, Wisconsin, and such other places as

notices to members are customarily posted, copies of the notice attached hereto as Appendix C. Copies of said notice, to be furnished by the aforementioned Regional Director shall, after being duly signed by an official representative of Respondent Union, be posted by it immediately upon receipt thereof and be maintained by it for a period of not less than 60 consecutive days thereafter in the aforementioned places. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the said Regional Director signed copies of the notice attached hereto as Appendix C, for posting in the plant of Respondent Company in Milwaukee, Wisconsin, in the places where notices to employees are customarily posted, in the event that said employer may wish to post the notices. Copies of said notices, to be furnished by the Regional Director shall, after having been signed as prescribed in the preceding paragraph of this Decree be forthwith returned to him for such posting by Respondent Company;

(d) Notify the said Regional Director in writing, within 10 days from the date of this Decree, what steps the Respondent Union has taken to comply herewith.

/s/ WALTER C. LINDLEY,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ H. NATHAN SWAIM,
Judge, United States Court of Appeals for the Seventh Circuit.

/s/ ELMER J. SCHNACKENBERG,
Judge, United States Court of Appeals for the Seventh Circuit.

A True Copy:
Teste

(SEAL)

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix A.

James Allison
Curtis Barbian
Donald Barbian
Russell Bestul
Keith Burdick
Joseph Bolcerek
James Corsentino
Jerome Czysz
James Dais
Bernard Daubon
Floyd Defenbough
Wayne Defenbough
Alvin DeGrave
Willard Dent
Standard Doxtater
Roman Fabich
William Fronimadis
Arthur Golding
Walter Griefenhagen
Eugene Groh
Reuben Hamari
Anthony Hendricks
Arthur Hofner
David Horgan
Robert Jackson
Roger Kearns
Kenneth Knoll
Robert Krueger
James La Mora
Marvin Lueptow
Corlyss Miller
Lawrence Mueller
Myron Nelson
Boleslaus Nowakowski
Emil Opasier
Arvin Pace
Raymond Pattenge
Orville Peak
David Perry
Russell Pruitt
Harold Reedich
Joseph Remillard
Vernon Rodd
Gregory Salazar
Erold Sasse
Harold Schwamb
Gerald Skorlinski
Stanley Skorlinski
John Stachera
Joseph Sulik
Harold Techmeier
Reynaldo Valdovinos
Joseph Wachowiak
Raymond Walsh
Norman Wittig
Ramon Witz
Henry Wiza

Appendix B.

Notice to All Employees
Pursuant to

A Decree of the United States Court of Appeals enforcing an order as modified of the National Labor Relations

Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT dominate, assist, foster, contribute support to, or in any manner interfere with the formation or administration of The Temporary Committee, or The Employees' Independent Union of Wagner Iron Works, or of any other labor organization of our employees.

WE WILL NOT contribute financial or other support to Bridge, Structural & Ornamental Workers Shopmen's Local 471, or any other labor organization.

WE WILL NOT recognize The Temporary Committee, or The Employees' Independent Union of Wagner Iron Works as the representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

WE WILL NOT recognize Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) as the representative of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until Local 471 shall have been certified as such representative by the Board.

WE WILL NOT discourage membership in International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or encourage membership in Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL) or The Employees' Independent Union of Wagner Iron Works, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to

join or assist International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE HEREBY WITHDRAW recognition from and completely disestablish The Temporary Committee, should it be revived, and The Employees' Independent Union of Wagner Iron Works as the representative of any of our employees for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

WE WILL offer to the 64 employees whose names are listed below immediate and full reinstatement to their former or to substantially equivalent positions without prejudice to their seniority and other rights and privileges and make them whole for any loss of pay they may have suffered by reason of the discrimination against them:

Gust John Gould	Kenneth Knoll
Jacob Steffes	Robert Krueger
Roy McMahon	James La Mora
Don McMahon	Marvin Lieptow
Wesley Bajanen	Corlyss Miller
Ervin Kusz	Lawrence Mueller
David Horgan	Muron Nelson
James Allison	Boleslaus Nowakowski
Curtis Barbian	Emil Opaiser
Donald Barbian	Arvin Pace
Russell Bestul	Raymond Pattenge
Keith Burdick	Orville Peak
Joseph Bolcerek	David Perry
James Corsentino	Russell Pruitt
Jerome Czysz	Harold Reedich

James Dais	Joseph Remillard
Bernard Daubon	Vernon Rodd
Lloyd Defenbough	Gregory Salazar
Wayne Defenbough	Erold Sasse
Alvin DeGrave	Harold Schwamb
Willard Dent	Gerald Skorlinski
Stannard Doxtater	Stanley Skorlinski
Roman Fabich	John Stachera
William Fronimadis	Joseph Sulik
Arthur Golding	Harold Techmeier
Walter Griefenhagen	Reynaldo Valdovinos
Eugene Groh	Raymond Walsh
Alexis Sobczak	Norman Wittig
Reuben Hamari	Raymon Witz
Anthony Hendricks	Henry Wiza
Arthur Hofner	
Joseph Wachowiak	
Robert Jackson	
Roger Kearns	

WAGNER IRON WORKS
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C.

NOTICE

To All Members of Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)
Pursuant to

A Decree of the United States Court of Appeals enforcing an Order as modified of the National Labor Relations Board and in order to effectuate the policies of the National

Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT restrain or coerce employees of the Wagner Iron Works, their successors or assigns, in the exercise of the rights guaranteed them in Section 7 of the Act by threatening to request their discharge for their failure to pay dues to the undersigned Union, except in accordance with Section 8 (a) (3) of the Act.

WE WILL NOT cause or attempt to cause the Wagner Iron Works, its agents, successors, or assigns, to discriminate against its employees in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees of Wagner Iron Works, its successors and assigns, in the exercise of their right to self-organization to form, join, or assist International Union, United Automobile, Aircraft And Agricultural Implement Workers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL make Roy McMahon and Don McMahon whole for loss of pay suffered by them by reason of the discrimination against them.

BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, SHOPMEN'S LOCAL 471 (AFL)
Labor Organization.

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B.

Opinion of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

OCTOBER TERM, 1954, JANUARY SESSION, 1955.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* No. 11121 *vs.* WAGNER IRON WORKS and BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471, (AFL), *Respondents.*	On Petition for Enforcement of an Order of the National Labor Relations Board.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner,* No. 11141 *vs.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	On Petition for Review of a Portion of an Order of the National Labor Relations Board.

March 7, 1955.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* In No. 11121 National Labor Relations Board petitions for enforcement of its order restraining respondents, Wagner Iron Works and Structural & Ornamental Iron Workers Shopmen's Local 471, AFL, from further commission of certain allegedly unfair labor practices proscribed by the National Labor Relations

Act, as amended, 29 U. S. C. A. §§ 151 *et seq.*, and requiring of each certain affirmative action (109 NLRB 445). In No. 11141, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, seeks to set aside that part of the same order dismissing the portion of the complaint which charged that the Wagner Company had wrongfully discharged certain named employees. Petitioner in No. 11141 was the charging party in all proceedings before the Board which are here for review. Two groups not parties to this cause were eventually active in the matters involved, namely, the Temporary Committee, which came into being at the Wagner plant as an interim agent of its employees, and its successor, the Employees' Independent Union. We shall refer to the parties as the Board, the Company, AFL, CIO, the Temporary Committee and the Independent, respectively.

For some 14 years AFL had represented the Company's employees as bargaining agent, under an agreement defining their relationship and their several obligations as employer and employees. The last contract, dated July 1, 1950, to continue for one year, was automatically renewable, unless terminated by 60 days' notice. On April 15, 1951, AFL notified the Company that it desired to terminate the agreement as of June 30, and to negotiate a new one.

Earlier in the year, certain employees had become dissatisfied with their representation by AFL. They complained that they had never seen the agreement and that union committeemen had been denied opportunity to examine its text and were, therefore, seriously handicapped in the adjustment of grievances. In May a dispute developed as to the interpretation adopted by the Company and AFL of the contractual provision governing holiday pay. AFL Committeeman Don McMahon approached and conferred with officials of the rival CIO regarding it. Later other employees, fearing that AFL intended to sign a new agreement with the Company without first submitting it to them, discussed their situation with CIO representatives and requested that union to organize the plant. The prime movers in this venture, employees Steffes and Gould, AFL steward and committeeman, respectively, became active in the CIO membership drive, which began in the latter part of May. To this end, with

the consent of their immediate supervisor, these men absented themselves from work on May 24 and 25, to solicit employees to join CIO. On Saturday, May 26, they reported for work, but, after spending an hour and twenty minutes at the plant, sought and obtained leave to take the remainder of the day off. When they reported for work on May 28, they were discharged.

On the same day, CIO notified the employer that it represented "an overwhelming majority" of the employees and, on May 31, it filed a petition for certification. On June 6, the Company and AFL consented that an election be held on June 18, and the Company posted a statement of neutrality. A tug of war then ensued between CIO and AFL in their struggle to win the election. Despite its protestation of neutrality, the Company, practically from the outset, sided openly with AFL, championing the cause of that union and attempting to defeat CIO. Thus, Company Vice-President Werner testified that he attempted "to enlist AFL help so they could beat the CIO." Meanwhile, on June 4, Don McMahon and his brother Roy were discharged, and a realignment of the Company's 55 men night shift was effectuated whereby 22 night employees were discharged and 18 transferred to the day shift. Both actions were approved by AFL.

On June 14 CIO filed its amended charge before the Board that the company had acted discriminatorily in discharging Gould, Steffes, the McMahons and the 22 night shift employees. It also filed a waiver of its right to object to the result of the election, because of the pendency of the charges.

AFL organizer Modell testified at the hearing that having become convinced that AFL was in danger of losing the election he asked Vice-President Werner in June to try to "have it held up for a bit". "I said * * * it was my opinion that * * * where an election was agreed to * * * any unfair labor charges would be dropped. He says to me, 'That was my opinion too.' * * * 'What can I do about it?' I says, 'Well, I don't know, but I suggest you do something about it.'" *Modell* said further that he "was anxious * * * to stop the election", but didn't recall whether he suggested that the employer withdraw its consent. *Werner* testified that he talked to an AFL official, probably Modell, between the 6th and 15th of June, concerning the possibility of AFL

winning the election but could not recall what was said. At any rate, on June 15, the Company withdrew its consent to the election. Werner testified that he called the Board's regional office and explained that the Company had consented to the election on the mistaken premise that the unfair practice charges had been withdrawn rather than waived merely for the purposes of the election.

Shortly thereafter, on June 20, the CIO adherents voted to strike and formed a picket line at the plant. AFL promptly notified the strikers that their action was unauthorized and directed them to return to work. On June 22, the Company notified many of the strikers that their employment was terminated, asserting that their action amounted to a breach of the no-strike clause of the contract.

On June 26 the Board conducted a representation hearing. That evening the CIO supporters voted to terminate the strike. The walkout ended the next day and the strikers offered to return to work. Some were reinstated; some were not. Three of those reinstated subsequently quit when the Company insisted they fill out new applications and start new, with loss of seniority rights.

No further contract negotiations occurred. The Company continued to deal with AFL as bargaining agent under the terms of the 1950 agreement until January 1952, when the Temporary Committee was established as interim bargaining agent. In February or early March 1952, at a meeting called by the Temporary Committee, the employees voted to organize a new union, as a result of which Independent came into being. From then on, until as late as May 13, 1952, the Company dealt with Independent concerning grievances and working conditions.

On July 13, 1951, CIO filed further specifications of charges, including a claim of statutory violations on the part of the company by interfering with the employees' right to choose their own bargaining agent, and another against AFL charging interference with employees in their choice of a bargaining agent. Pursuant to an order consolidating the charges, a complaint was filed on March 11, 1952, averring in substance that: the company had engaged in unfair labor practices in violation of Sections 8 (a)(1), (2), and (3) of the Act, 29 U. S. C. A. §§ 158(a)(1), (2), (3), by: (a) a continuous course of conduct by which it assisted and dominated AFL, and, subsequently, the Temporary Committee; (b) discriminatorily discharging

Gould, Steffes, the McMahons, Smejkel and the 22 night shift employees; (c) discriminatorily discharging 66 employees who had participated in the strike and constructively discharging four named employees; and (d) engaging in other specified acts of interference with and coercion of its employees in their right to select a bargaining agent. On April 29, 1952, the trial Examiner permitted an amendment adding the Independent as a respondent and averring that the Company had unlawfully assisted and dominated it. The complaint further charged that AFL had engaged in unfair labor practices in violation of §§ 8 (b) (1) (A) and (2), 29 U. S. C. A. §§ 158 (b) (1) (A), (2), by: (a) attempting to cause the Company to discharge discriminatorily Don and Roy McMahon, and (b) pursuing a course of conduct tending to interfere with and coerce employees in their choice of bargaining agent.

On November 6, 1952, the examiner filed his report suggesting an order sustaining the complaint except as to the charge that the Company had wrongfully discharged the ten men mentioned in CIO's petition in Cause No. 11141. On April 28, 1953, the Board entered its decision adopting the examiner's findings and entering an order accordingly. As to the ten employees involved in Cause No. 1141, the Board concluded that the Company discharged one of them, Smejkel, solely because of misconduct, and that there was no evidence in the record that the remaining nine, discharged at the time of the strike, were discharged for CIO participation or that they ever sought or were refused reinstatement.

The Company was ordered to reinstate, with back pay, Gould, Steffes, the McMahons, the twenty-two night shift employees, fifty-seven unfair labor practice strikers and three men which the Board found to have been constructively discharged after their reinstatement following the strike. AFL was ordered, *inter alia*, to notify the Company that it had no objection to the reinstatement of the McMahons and to make the McMahons whole.

Validity of the Order Against AFL.

Although counsel for AFL filed an appearance, no answer or brief was offered and no representative appeared on its behalf on oral argument before us. A question as to the effect of this status having been raised by the Court at the hearing, subsequent to oral argument, on December

9, a letter from counsel was lodged with the Clerk, without objection, advancing the postulate that the position of AFL is the same as that of the Company and that it adopts the brief and argument of the latter. Two theories are advanced for this position, namely, that the rights and duties of the Company and AFL under the collective bargaining agreement of July 1, 1950 are correlative, or, in the alternative, that the liability *ex delicto* of AFL depends upon the culpability of the Company, and that, a judgment relative to the company should control disposition as to AFL. These theories, unfortunately, are not applicable. The unfair labor practices charged against the respective respondents do not grow out of interpretation or application of the contract. The only possible question before us relative to the agreement is whether the acts charged may be justified as legitimate action by respondents in the protection of their respective contract rights. Since the acts of the employer and those of AFL were those of separate entities effectuated by the agency of their respective officers and representatives, there can be no correlation or inter-dependence in the separate acts of the two respondents.

The tort aspect of AFL's position is equally untenable. The consolidated complaint charged that various activities of the Company and its supervisory personnel were unfair practices. Two separate courses of activity were specified against AFL, namely, coercion of employees by its chief steward and its contribution to the employer's discharge of the McMahons. The Board sustained both charges. The first is in no sense derivative, while the latter is only partly so. The Board found that an officer of the AFL attempted to cause and did cause the Company to discharge the McMahons discriminatorily. Even if we should set aside the finding that the discharge was in fact discriminatory, the finding that AFL caused the discriminatory discharge, being derivative, would fall, but the finding of an attempt would still remain, and it is, of itself, a violation of Section 8 (b) (2).

A petition for enforcement of an order is a special statutory proceeding in which the Court alone may make the order coercively effective. *NLRB* v. *Ford Motor Co.*, 119 F. 2d 326 (CA-5). It is a combination of an appeal from the order and an original proceeding to enforce it. *NLRB* v. *Kellburn Mfg. Co., Inc.*, 149 F. 2d 686 (CA-2). In one

sense, our function is that of a Court reviewing the record to determine whether the findings are sustained by the evidence; there the burden is on the respondent to show want of substantial support. In another sense, our function is that of exercise of original jurisdiction, to determine whether and to what extent the order should be enforced or set aside. *NLRB* v. *Kilburn Mfg. Co., Inc., supra.* In the latter situation the Board appears as a litigant, who must sustain the burden of showing its right to enforcement, *NLRB* v. *Ford Motor Co., supra;* See *Magnolia Petroleum Co.* v. *NLRB,* 112 F. 2d 545 (CA-5), *i.e.,* that the order is supported by the findings and is in compliance with the statute. *NLRB* v. *Kellburn Mfg. Co., Inc., supra.*

AFL, having failed to answer the petition or otherwise defend is a party in default. This situation is the same as that in the *Kellburn* case, *supra,* in which the employer failed to defend an enforcement proceeding. We agree with the view therein expressed, that the defaulting respondent must be held to have confessed the allegations of the petition, insofar as they relate to the appeal phase of the proceedings, *i.e.,* the substantial evidence question, and that our only function, therefore, is to examine the findings to see whether they support the order and whether the order complies with the statute, issues on which the Board bears the burden of proof. We conclude as a matter of law that the Board has sustained the burden on each issue and that the order is amply supported by the findings of coercion and of the attempt to cause the Company to discharge discriminately the McMahon Brothers. Judgment for enforcement will be entered against the AFL.

Validity of the Order Against the Company.

Ultimately, whether enforcement is to be decreed depends primarily on whether the findings are supported by substantial evidence "when viewed in the light that the record in its entirety furnishes." *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 488. The controversy here involves the sufficiency of the evidence to support the findings of fact as to: (a) Acts of discrimination prior to the strike said to violate Section 8 (a) (1) and (3); (b) Acts of support and domination of unions as violative of Section 8 (a) (2); (c) Acts of interference and restraint of em-

ployees in their right to choose a collective bargaining agent as violative of Section 8 (a) (1); and (d) Acts of discrimination in employment subsequent to the strike. The Company asserts cause for action peculiar to each group.

Discrimination Prior to the Strike.

Obviously, the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *U. S. Steel Co.* v. *NLRB*, 196 F. 2d 459, 465-6 (CA-7). The Board may not "substitute its judgment for that of the employer as to what is sufficient cause for discharge," *NLRB* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 264 (CA-5), and discrimination may not be inferred from an employee's mere membership in a union. *Indiana Metal Products Corp.* v. *NLRB*, 202 F. 2d 613 (CA-7); *NLRB* v. *William Davies Co.*, 135 F. 2d 179, 183, cert. denied 320 U. S. 770 (CA-7). In every case the burden is on the Board to prove that an employee's discharge resulted from his union activities. *Indiana Metal Products Corp.* v. *NLRB, supra; NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680, 690 (CA-7). We review the pertinent separate findings of the Board with these principles in mind.

The Discharge of Gould and Steffes.

Gould and Steffes, who were, as previously noted, leaders in the efforts of the CIO to organize, were discharged when they reported for work on Monday, May 28, 1951, as the Board found, because of their union activity. The Board rejected as a mere pretext the Company's contention that they were discharged because they had reported to work the preceding Saturday while intoxicated.

After examination of the records we are unable to say that this finding is not supported by adequate substantial evidence. These men were employed on the night shift, under assistant Superintendent Schnuck and foremen Bartsch and Golner. They testified that they received permission from Schnuck to absent themselves from work for a part of the night of May 23 and for the nights of

May 24 and 25. This time they devoted to meetings with CIO officials and solicitation of employees for CIO. Schnuck admitted that he excused them from work on these days. Saturday morning, May 26, the two men spent, for the most part, in nearby taverns soliciting such of the employees as were present, on behalf of CIO. At noon, they reported for work. Shortly later, Gould asked a fellow employee, Barbian, and Foreman Golner to join the CIO. After working about an hour and twenty minutes both Gould and Steffes sought and received permission from Schnuck to take the rest of the day off, during which time they continued their rounds of employee hangouts soliciting adherents for CIO.

When they reported the following Monday, May 28, they were discharged. Both testified that they were informed by Schnuck that they were discharged for passing out CIO cards; and the AFL chief steward Handon was called in to confirm the charge. Employee Bestul testified that shortly after the two were discharged, Schnuck saw Bestul talking to Steffes and ordered him off the premises, saying that he was fired. Bestul's testimony as to this conversation follows: "Mr. Schnuck came up to me, and he said * * * 'Jake and Johnny were fired for being drunk * * *' I said, 'Johnny Gould was helping me * * * and I never knew that that man was drunk. In fact, I did not know that that man had been drinking at all.' To which Mr. Schnuck said, 'Oh, yes, he was loaded.' I said, 'If he was loaded, why didn't the Company send him home?' Mr. Schnuck said, 'Well, I was just going to send him home.' Then he went on to talk about the CIO. He said, 'After all Johnny and Jake are radical about the CIO,' and he says, 'Furthermore, they cannot switch unions. We had an election here * * * it doesn't do them any good to try to get the CIO in now.'"

Employee Don McMahon reported his conversation with Schnuck as follows: "After I punched out Tom asked me if I had heard * * * that Johnny Gould and Jake Steffes were trying to get the CIO in there, and I told him no, * * * and he says, 'Well, that's no good, we are making out pretty good with the AFL already. We will have to see if we can't do something about that,' and I agreed with him * * * 'we don't want anything like that, all we'll have is a bunch of strikes and stuff on our hands, and we've been coming along pretty well with the AFL * * *'" These conversations were not denied,

except that Schnuck testified that he did not recall Bestul telling him that Gould had not been intoxicated and, further, that he discharged the men because of reports that they had been drunk.

The evidence as to the men's intoxication was in conflict. Gould and Steffes testified that they spent Saturday morning soliciting for CIO in bars near the plant and that each, during that time, had one or two glasses of beer. Another employee, Ebbinger, testified that he met them at a bar in the morning; that they left about 10:30 and went to Gould's apartment where they discussed the union problem; that he was with them from 9 to about 11:45 A. M., when he left; that he again met the two men at the plant gate at noon and went into the plant with them; that neither was drunk; and that during the time he was with them in the morning, they were not drinking heavily, but had "about one glass" of beer. Employees Bestul, Roy McMahon and Pattenege testified that they had seen Gould and Steffes at work that Saturday and that their demeanor and actions did not indicate that either had been drinking.

On the other hand, foremen Bartsch and Golner and employee Manhoff testified that Gould and Steffes were intoxicated when they reported for work on the afternoon in question. Schnuck testified that Bartsch and Manhoff reported to him, between noon and the time when Gould and Steffes left on that day, that the two were drunk. Manhoff said that although Steffes was intoxicated, he reported that fact only to Bartsch sometime the following week. Bartsch testified that Gould was drunk while at work on the day in question, but that he didn't report that fact to anyone that day. Golner testified that on the afternoon in question he had reported to Schnuck that Gould was passing out CIO cards and that he and Steffes were intoxicated. The examiner expressly discredited Golner's testimony on this point. He found it impeached by the fact that Golner admitted that his testimony was in conflict with statements made by him in a pretrial affidavit in which he had stated that on the afternoon in question he had reported to Schnuck that Gould was soliciting for CIO, but had said nothing about them being drunk. Further, it is undisputed that during the time Gould was at work that day, Golner assigned him to help Bestul on a saw, a task which all witnesses agree was hazardous and not safe for anyone under the influence of alcohol.

Thus, whether the two men were intoxicated in the afternoon and whether Schnuck had any knowledge of that fact, if true, was largely a question of credence of witnesses. We cannot say on the record as a whole that the finding that they were discharged because of their union activity is not adequately supported by substantial evidence. Two opposing inferences might have been equally reasonable, but we are not justified in ignoring the advantage which the examiner had in judging the witnesses' credibility, *NLRB* v. *Dinion Coil Co.*, 201 F. 2d 484 (CA-2), or in displacing the Board's choice between two fairly conflicting views. *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529, cert. denied 346 U. S. 909 (CA-7). Under this record the Board did not unreasonably infer from the circumstances that union activity was the reason for the discharge of the two men. *R. R. Donnelley & Sons Co.* v. *NLRB*, 156 F. 2d 416 (CA-7), cert. denied 329 U. S. 810.

Discharge of the McMahon Brothers.

As we have observed, the Board found that Don and Roy McMahon were discriminatorily discharged because of their activities on behalf of CIO. The evidence indicates that Roy was an early adherent to and an active campaigner on behalf of CIO. Don, who had discussed the holiday pay question with CIO representatives, apparently remained loyal to AFL in the representation dispute. Roy's foreman, Krueger, testified that on June 4, he was questioned by Superintendent Dyskow, as to whether he had missed any of his men on the afternoon of May 29. Krueger replied in the negative. Dyskow then said that Roy McMahon had been seen in a tavern that afternoon; that his brother Don had punched Roy's card; that an FBI check had revealed Don's fingerprints on the card. The witness said that he had been questioned also by Vice-President Werner who repeated substantially the statement made by the Superintendent. He replied that he told Werner that he knew Roy had not been absent, because he, Krueger, had made the customary check of Roy's production at the end of the shift, and, further, that Werner instructed Dyskow to call in the McMahons and the AFL shop committee, and dismissed Krueger saying, "We won't need you here anymore." According to the undisputed testimony of the McMahons, they were then called into Dyskow's office and discharged in the presence of Werner, Dyskow, President Wagner and the AFL shop committee. The reason then given by Dyskow for the dis-

charge was that Roy had left work about 2:30 P. M. and that Don had punched his brother out at quitting time. Werner was quoted as stating that he had already informed Waldow of the discharge; that the matter should be taken up with AFL and that if he had a man on his committee who was a spy for CIO he would get rid of him. To Don's denial of the spying charge, Werner is quoted as saying that he had loyal men reporting to him and "We know what is going on."

Witnesses testified that on the following day, some ten or fifteen employees, including Krueger, Barbian and some of the AFL committeemen, went to Dyskow's office, where each, in turn, reported that Roy had been present on the afternoon in question, and that Dyskow listened to them, without comment, except to state that he had information that Roy had been absent and that Don had punched him out.

Neither Werner nor Dyskow testified as to the reasons for the discharge of the McMahons. Werner said, on cross-examination, that he had not procured an FBI check of the time card, and that any statement that he had was false. Assistant-Superintendent Banaszak testified that Roy was absent on the afernoon in question; that he walked past Roy's work station about 2:30 in the afternoon and did not see him at work; that he did not see Roy at his station any time that day, and that he was certain he had made more than one tour of the department during the afternoon. On cross-examination he said that he could not remember the time of any tour except that made at 2:30; that he was sure he made others, because he customarily walked through and checked each section several times in the course of an afternoon; that a man absent from his machine at any particular time might be in the washroom or elsewhere in the building, and that he did not report Roy's absence to anyone prior to Roy's discharge. He testified also that he had seen Don on three occasions punching Roy's time card in the morning; that he had warned Don not to do so and had reported the occurrence to Dyskow, and that the last date when he had seen Don punch Roy's card was May 29. Don admitted that he had made it a practice to punch in the card of the driver of his car pool, while the driver parked the car, but had refrained from so doing after Banaszak's warning. There was also undisputed testimony that the practice was not unique at the plant. Two witnesses testify-

ing to conversations with AFL chief steward Handon, shortly after the discharge, quoted him as stating that he had had the McMahons fired because they were stool-pigeons for CIO and were undermining AFL. Handon denied these conversations or any such admission on his part. This evidence, we think, affords substantial support for the finding of discrimination.

The Company contends, however, that the Board's case rests solely on inference, hearsay and self-serving statements; that Banaszak's testimony that Don had in fact punched Roy's card on three occasions proves that cause existed for discharge, and, further, that the claim of the McMahons was never submitted to arbitration. Each argument must fail. The testimony stands uncontradicted as to the nature and content of the conversations had just preceding, during and immediately after the discharge. That the testimony of the McMahons was self-serving goes only to the question of their credibility. We are not justified in saying that their testimony was not worthy of belief. The testimony of Krueger, Barbian and other witnesses that they had told Dyskow on June 5 that Roy had not been absent from work on the afternoon in question was certainly competent as to the conversations the witnesses personally had with Dyskow and as to the fact that some ten to fifteen employees sought out Dyskow to report Roy's presence.

Nor can reliance be soundly based on Banaszak's testimony to support unsubstantiality and to prove that these employees were discharged because of the card-punching incidents. For, even if we believed that these events furnished good cause for discharge, on the record, it was not unreasonable for the Board to find that the discharges were in fact motivated by the employees' CIO activities. *R. R. Donnelley & Sons Co.* v. *NLRB, supra; NLRB* v. *Chautauqua Hardware Corp.*, 208 F. 2d 750, 751 (CA-2).

Failure of the McMahons, Gould and Steffes, to arbitrate the question of the validity of their discharges can be of no avail to the Company. As the procedures of the contract including arbitration were set up in the agreement with AFL, it is extremely doubtful that that union would object seriously to the discharge of CIO adherents, in the course of an all out battle between two unions for representation. The truth of this statement is supported by the testimony of AFL business agent Waldow that he

did not object to the discharges and "was not opposed" to them. Though the Company offered to recognize a CIO grievance committee at one time, the offer was withdrawn before effective negotiation could be had. And, since CIO was not a party to the contract, any basis for effective adjustment of grievances by its committee is at best speculative.

Furthermore, arbitration provisions in a bargaining agreement cannot oust the Board's jurisdiction to prevent unfair labor practices. As we said, in *NLRB* v. *International Union, etc.*, 194 F. 2d 698, 702, "the Act confers upon the Board exclusive jurisdiction to prevent unfair labor practices * * *. The Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration."

Discharge of the Twenty-two Night Shift Employees.

The Board ordered reinstatement of twenty-two night shift employees who, it found, had been discharged in order to discourage CIO activity. The Company offered proof that the discharges and the resulting realignment of the night shift were prompted by a building expansion program designed eventually to eliminate all night operation.

After reviewing the evidence, we think it clear that the Board did not sustain the burden of proving that these discharges were discriminatory. The record does not disclose the union affiliation or leanings of any of the discharged employees. It does not support the essential finding that the Company knew of the CIO membership or leanings, real or presumed, of the discharged employees. See *NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (CA-7). There appears of record only the evidence that these men were discharged during the representation campaign, the testimony of conversations in which Werner was quoted as saying that he had loyal employees reporting to him and knew what was going on, and the testimony of a witness who quoted foreman Wotta as saying that Dyskow had told him, Wotta, that the night work would not be resumed at full force because he didn't want the CIO activity to be resumed.

The finding that the discharge of these men was discriminatory cannot be sustained by speculation drawn from the flimsy evidence presented that the Company

knew of their CIO activity if any. See *NLRB* v. *National Paper Co.*, 216 F. 2d 859, 862-3 (CA-5); *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883 (CA-1) *Tampa Times Co.* v. *NLRB*, 193 F. 2d 582 (CA-5). Unless there is a reasonable basis in the evidence for the finding of knowledge "the employer need not excuse or justify his action." *NLRB* v. *Whitin Machine Works, supra,* at page 885. See *NLRB* v. *Reynolds International Pen Co., supra,* at page 690. Accordingly, the Board's finding and order as to the discriminatory discharge of these twenty-two employees must be denied enforcement.

Support and Domination of Unions.

Substantial evidence on the record as a whole adequately supports the findings that the Company supported and fostered AFL and supported and dominated the Temporary Committee and the Independent in violation of Section 8 (a)(2) of the Act. In addition to the admission by Werner and Dyskow that they favored AFL and worked actively to defeat CIO's drive, it appears that Werner prodded AFL into action to offset the CIO attack; that the Company aided AFL by printing and distributing to its employees inflammatory anti-CIO literature, most of which was distributed by company personnel at the plant gate during working hours on company time; that AFL organizers were granted access to all areas of the shop for organizational purposes, while the same privilege was expressly denied CIO; that AFL chief steward Handon was permitted to solicit dues and support for his union on Company time; that Werner suggested to AFL officials that they employ force to break up a CIO meeting and to break up the picket line, offering in each instance financial support to satisfy any liability which might be incurred for damage to property. The Company withdrew its consent to the election; it continued to recognize and deal with AFL as bargaining agent after the latter's majority status was in dispute, both before, and for a considerable period of time after, expiration of the bargaining agreement. It volunteered aid to AFL in collection of dues, by suggesting institution of a check-off arrangement, a privilege which it had previously denied.

In January, 1952, the company suggested to the AFL committee that the employees form an independent union to act as interim bargaining agent and aided in the forma-

tion of the Temporary Committee. For example, the plant loudspeaker system was made available to the Committee to announce organizational meetings; the Company newspaper was employed to publicize and support the Committee's activities; notices and propaganda literature were printed by the Company, using the personnel and facilities of its general offices. The Company premises and facilities were made available for meetings and an election to adopt the Temporary Committee, during working hours on Company time.

The Employer's hand in the organization of Independent is not quite so obvious. There is, however, undisputed testimony to support the conclusion that Independent was the brain-child of the Company, in collaboration with the AFL committee. We think the finding of its support and domination is amply sustained by the evidence.

The Company, objecting to the finding that it supported the AFL, argues first, that such support as the evidence supplies constitutes merely permissible exercise of its statutory guarantee of freedom of speech. The rights of the employer in this respect must be construed in conjunction with its duty to maintain neutrality in a contest between rival unions. We said in *NLRB* v. *LaSalle Steel Co.*, 178 F. 2d 829, 835, that Section 8(c) is no more than a restatement of the principles of the First Amendment to the Constitution. See *NLRB* v. *Kropp Forge Co.*, 178 F. 2d 822, 823-27, cert. denied 340 U. S. 810 (CA-7). As we held, to construe Section 8(c) so as to permit, under the guise of free speech, acts which otherwise would be coercive or unlawful "would nullify the guaranty of employees' freedom of action and choice which Section 7 of the Act expressly provides." 178 F. 2d at page 829. The free speech provisions cannot extend to such activities as were here committed in furtherance of keeping AFL as bargaining agent, for the Company's actions far exceeded the mere expression of a preference and ignored the requirement that the employer maintain neutrality with respect to contesting unions. See *e. g.*, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *NLRB* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163 (CA-7); *Harrison Sheet Steel Co.* v. *NLRB*, 194 F. 2d 407, 410 (CA-7); *NLRB* v. *Kropp Forge Co.*, 178 F. 2d 822, 823-27, cert. denied 340 U. S. 810 (CA-7).

The Company's further insistence that this finding is

refuted by its express declaration of neutrality is unconvincing, for its action, through Werner and other supervisory personnel, wholly belies the statement, which we must consider in the light of facts which the record as a whole supports, *NLRB* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9 (CA-8). Mere "lip service to the policy and purposes of the Act is not sufficient." *Ibid* at page 13. See also *Magnolia Petroleum Co.* v. *NLRB*, 200 F. 2d 148, 150 (CA-5).

Equally wanting in merit, is the argument that the Company's acts in support of AFL were permissible activity to protect its rights under the contract with that union. Inasmuch as grievance, arbitration and other procedures cannot oust the Board's jurisdiction. *NLRB* v. *International Union, etc.*, 194 F. 2d 698, 702 (CA-7), activities within the realm of unfair labor practices can never qualify as contract rights entitled to protection. Indeed there is no contract right which the Company's activities at issue herein were designed to protect, unless the employer is attempting to assert a contract right to maintain AFL as the bargaining agent for its employees. Obviously, such a position is fatally inconsistent with the employees' right to representation by a bargaining agent of their own choice. This part of the order must be enforced.

Interference, Coercion and Intimidation.

The Board found, and substantial evidence supports the finding, that during the course of the organizational campaign, the Company's supervisory personnel interrogated employees about their union activities, instructed employees to remove CIO stickers and buttons from their persons and from plant property while they, in some cases, were themselves wearing AFL insignia, that it threatened employees with discharge, added work-loads or other reprisals because of support of the CIO, instituted surveillance of the employees' union activities, offered financial gains to employees in the form of 10 hours' pay for 9 hours' work, offered its employees increased benefits in the form of a profit-sharing plan and wage increases, at a time when the question of representation was pending, and compelled returning strikers to condition their reinstatement upon removal of their CIO buttons, upon refraining from CIO activity and upon forfeiting seniority. The evidence on this phase of the case is not largely in dispute and, even

in cases where conflict exists, we cannot say that the Board's findings are not substantially supported by credible evidence.

The Company relies, as to the finding of interrogation and surveillance, on its contention that these activities are permissible under the free-speech guaranty. It contends that reasonable interrogation is permissible and that an employer is entitled to institute reasonable surveillance to keep himself informed as to what is going on in his plant. We may accept these contentions as correct statements of the law, assuming that such activities are so conducted as not to be intimidating or coercive. Thus, the Board has recently held that an employer may legally interrogate his employees as to their union membership in order to inform himself as to the validity of a union's claim of majority support. *Blue Flash Express, Inc.*, 109 NLRB No. 85. However, as the Board said, the object of interrogation must be within the law and an employer acts at his peril, lest his investigation become tainted and coercive when considered in conjunction with other activities which reveal a departure from strict neutrality.

We are not here concerned with whether each of the activities found to exist if standing alone, would be coercive. Our language in *NLRB* v. *Kropp Forge Co.*, 178 F. 2d at pages 828-9, is pertinent: "It * * * seems clear to us that in considering whether such statements or expressions are protected by Section 8 (c) of the Act, they cannot be considered as isolated words cut off from the relevant circumstances and background in which they are spoken. A statement * * * might seem perfectly innocent * * *, including neither a threat nor a promise. But, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his employees' freedom of choice and action. * * *. If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice."

We believe the record before us demonstrates a general

pattern and course of conduct on the part of the Company to discourage the employees in their right to choose, beginning with the discharge of Gould and Steffes and continuing until some time after the end of the strike in June 1951 and the apparent defeat of the CIO drive. Although, some findings of unfair practice under this heading, notably that of surveillance, rest almost solely on inference, when considered as a part of that general pattern of conduct, we think the Board was justified in finding the practices coercive.

Discrimination Subsequent to the Strike.

Whether the discharge and refusal to reinstate the fifty-seven strikers and the constructive discharge of three others by conditioning their reinstatement upon loss of seniority were discriminatory depends on whether the *strike was a protected activity.* If it was, the discharges and refusals to reinstate were unlawful. In stamping these discharges unlawful, the Board rejected the Company's defense that the strike was unprotected because it was in violation of the no-strike clause of the AFL contract and in violation of Section 8(d) of the Act, 29 U. S. C. A. § 158 (d).

Section 13 of the contract established a procedure to settle grievances "involving the meaning, application or interpretation of this agreement." Section 14 provided for arbitration of any dispute "which has not been satisfactorily settled" by employing section 13 procedures, but that "the authority of the arbitrator shall be limited to the interpretation and application of the express terms of this agreement." Section 15 provided that "(A). The Company and the Union agree that the grievance procedure provided herein is adequate to provide a fair and final determination of all grievances that may properly arise *under the terms of this agreement,* and shall be the sole means of disposing of grievances. It is the desire of the Company and the Union to avoid strikes and work stoppages and lock-outs. (B) The Union agrees that neither it nor its members, individually or collectively, will, during the term of this agreement, cause, permit, approve or take part in any strike * * * except for the refusal of the Company to arbitrate in accordance with Section 14 or * * * to abide by the award of the Arbitrator." (Emphasis supplied.)

The Company contends that the word "strike" means any strike for whatever cause. This contention, it seems to us, erroneously assumes that the language of section 15 (B) must be read alone without relation to other provisions of the contract. The "no-strike" clause must be interpreted in the light of other terms of the contract. The agreement covers rates of pay and working conditions, and its remedial provisions do not purport to extend beyond that. Thus, as we have observed, the grievance procedure is expressly designed to settle disputes over the "meaning, application or interpretation of this agreement"; the arbitration provision is expressly limited "to the interpretation and application of the express terms of this agreement"; the policy statement of the parties, which forms a basis for the "no-strike" and "no-lock-out" clauses, is an agreement that such procedures are adequate "to provide a fair determination of all grievances which many properly arise under the terms of this agreement." The no-strike clause which follows immediately after this statement must be construed, as equally restricted, *i.e.*, as a surrender of the right to require a change in the contract or as a means of settling any dispute which is embraced by its terms. Since the contract does not purport to reach all conceivable phases of employer-employee relations, this clause can not well be interpreted as a surrender of the right of self-help, as a measure to protest against unfair labor practices.

Substantial evidence supports the Board's finding that the strike was motivated by the Company's unfair labor practices. Indeed, the record suggests that this resort to self-help was directed against a continuing course of conduct on the part of the Company wihch was in flagrant disobedience to the statutory mandate. The Court of Appeals for the Second Circuit has recently had occasion to consider the contentions here raised in a strikingly similar situation. The Court said, "The right of employees to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition." *NLRB* v. *Mastro Plastics Corp.*, 214 F. 2d 462, 464-465, cert. granted January 10, 1955. We find no authority conflicting with the rule stated.

Cases cited by the Company fall largely into two categories, exemplified by two decisions of this court. In *NLRB* v. *Columbian E. & S. Co.*, 96 F. 2d 948, aff'd 306 U. S. 292, we refused enforcement of an order to reinstate certain discharged striking employees on the ground that their strike was in violation of a no-strike clause in a contract with Columbian. There, however, the strike was called by the bargaining representative to force the employer to accede to its demands that an existing contract be amended by the addition thereto of a closed shop provision. The other type is illustrated by our decision in *United Biscuit Co.* v. *NLRB*, 128 F. 2d 771, where various units of United's employees were represented by three separate local unions, including Locals 431 and 264. Local 431 called a strike against practices which United conceded were invalid under the Act. When the employees in Local 431 went out, the officials of Local 264 called a strike in violation of a no-strike clause in its bargaining agreement with the employer. We denied enforcement of so much of the Board's order as required reinstatement of certain Local 264 employees who had been refused reinstatement after the strike, holding that theirs was a sympathy strike, not one directed against any unfair practice which affected employees of that local. Other cases cited by the Company fit roughly into one or the other of these categories, which, obviously, are to be distinguished on their facts from the case before us.

We agree that an unfair labor practice strike is not within the proscription of the provisions of Section 8(d). Section 8(d) (4) requires any party to a bargaining contract who desires to terminate or modify the same to continue "all the terms and conditions of" such contract "in full force and effect without resorting to strike or lockout for a period of sixty days after [notice of termination is given] or until the expiration date of such contract, whichever occurs later." 29 U. S. C. A. § 158 (d)(4). This section we have interpreted as providing an orderly method for the modification or termination of existing agreements by proscribing, during the sixty day cooling off period, strikes which interfere with the operation of the statutory method, *i.e.*, strikes to compel termination of the agreement or modification of its terms. That section has no application to a strike caused by an employer's unfair labor practices, in no way concerned with questions of termination or modification of the existing agreement.

NLRB v. *Mastro Plastics Corp.*, 214 F. 2d at pages 465-6 (CA-2), distinguishing *Local No. 3, etc.*, v. *NLRB*, 210 F. 2d 325 (CA-8).

The Company's argument that this controversy involves only a dispute between itself and CIO is an oversimplification of the issue. If it were true that the controversy involves only the Company, the AFL and the CIO as legal entities, there might be some justification for a rule which would *permit a fight to the finish without interference.* But here it appears that this dispute was touched off by widespread employee dissatisfaction with their representation by AFL. And CIO was not reluctant to step in and capitalize the situation. However, the statute guarantees to employees the right to select their own bargaining agent and, as previously pointed out, this sanction inherently includes the right to change bargaining agents by lawful methods without the employees thereby subjecting themselves to coercive acts on the part of the employer. The fate of the employees in such a situation is, indeed, a dire one, if each of the three interested parties is entitled to ignore the statute and to direct his actions accordingly in the promotion of his selfish interests at the employees' expense. That, in the final analysis, is the full scope of the Company's contention. CIO appeared on the scene at the behest of employees. There is no substantial evidence that the campaign was marked by unprotected activities on the part of CIO adherents, unless the strike is to be placed in that category. If the practice of raiding by rival unions needs control, that is a subject for legislative attention, not judicial. It certainly is not for an individual employer to determine for itself how to meet what it considers the exigencies of each individual case. We conclude that the Board was amply justified in holding that the June 20 strike was a protected concerted activity caused by respondent's unfair labor practices.

Bias

The record does not support the Company's assertion that the Examiner was so biased as to render the order invalid. The principal contention in this respect is that the Examiner discredited all of the Company's witnesses and credited all those called by the General Counsel. This fact, if it had been the fact, would not of itself prove bias. *NLRB* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 658-60. Furthermore, in instances where the General Counsel's

witnesses were credited over Company witnesses, the question was essentially one of credibility which cannot be disturbed unless we can say that the credited witnesses could not possibly be believed. This we cannot do. Furthermore, the evidence in this respect is free from conflict on most questions. The Company called few witnesses, relying, as it does here, on its contention that the General Counsel had not sustained his burden of proof. Thus, the Company's premises in this respect are merely reargument of the substantial evidence question in different form.

The Company raises a further question. The complaint against AFL was continued early in the proceeding before the Examiner, pending approval by the General Counsel in Washington of a settlement agreement with that union. Counsel for AFL then withdrew from the proceedings. The agreement was ultimately disapproved, and AFL reentered the case. The Company objected to this procedure. It fails, however, to show that it was prejudiced by these on again off again tactics of AFL. This manner of proceeding does not indicate bias.

Substantial evidence supports the Board's findings that employee Smejkel was discharged for cause, not for engaging in CIO activities, and that, as to the nine strikers, the General Counsel failed to prove that these men had sought and been denied reinstatement. In short, there is no evidence of record relating to the status of these men at any of the pertinent times herein.

The petition of CIO is denied.

The order against the AFL will be enforced. The order against the Company is modified by deleting the provisions requiring reinstatement of the twenty-two night shift employees, and, thus modified, will be enforced.

APPENDIX C.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, April 5, 1955.

Before:

Hon. WALTER C. LINDLEY, *Circuit Judge.*
Hon. H. NATHAN SWAIM, *Circuit Judge.*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
No. 11121 *vs.*
WAGNER IRON WORKS, *et al., Respondents.*

Petition for Enforcement of an order of the National Labor Relations Board.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner,*
No. 11141 *vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review of an order of the National Labor Relations Board.

It is ordered by the Court that the petition for a rehearing of this case be, and the same is hereby DENIED.

APPENDIX D.

Motion to Stay Entry of a Decree.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
WAGNER IRON WORKS and BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471, AFL,
Respondents.
No. 11121.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 11141.

MOTION OF RESPONDENT WAGNER IRON WORKS TO STAY ENTRY OF A DECREE, ETC.

Now comes the Respondent Wagner Iron Works in the above causes, and moves the Court as follows:

1. That entry of a decree in these cases be held in abeyance or stayed pending the ruling of the United States Supreme Court in *NLRB v. Mastro Plastics Corp.*, 214 Fed. (2d) 462 (C. A. 2), certiorari granted Jan. 10, 1955,

U. S. Supreme Court Docket No. 454, 99 L. Ed. 206 (Adv. Sheets).

2. That in the alternative, if a decree is entered herein, enforcement of the decree be stayed pending the ruling of the United States Supreme Court in the *Plastics* case.

This Court's Decision, pp. 20-22, relies strongly on *NLRB v. Mastro Plastics Corp.*, 214 Fed. (2d) 462 (C. A. 2) which this Court says involved a "strikingly similar situation." Board counsel wrote to this Court on January 14, 1955, calling attention to the fact that the Supreme Court granted certiorari in that case on January 10, 1955. We believe Board counsel's letter implied a request to this Court to hold up decision in this case until the Supreme Court reviewed the *Plastics* case. The *Plastics* case is contrary to and in conflict with *Local No. 3 etc.* v. *NLRB*, 210 Fed. (2d) 325 (C. A. 8). The U. S. Supreme Court denied certiorari in the *Local 3* case (348 U. S. 822, 99 L. Ed. 29), but granted certiorari in the *Plastics* case. The *Plastics* case is also contrary to the Board's own ruling in the later *Lion Oil Co.* case, 109 NLRB No. 106.

We believe that this Court should stay decision on this petition for rehearing pending decision of the *Plastics* case by the U. S. Supreme Court. For if the Supreme Court reverses the *Plastics* case, it would necessarily mean an opposite construction of *Sec. 8(d)(4)* of the Labor Management Relations Act and of the no-strike clause in labor contracts by the Supreme Court from the construction adopted by this Court. The substantial questions in the *Plastics* case, as in this case, are whether an "unfair labor practice" strike is within the prohibition of *Sec. 8(d)(4)* of the Act and of a no-strike clause in a labor contract. It is, therefore, only right and just that this Court should await the decision of the U. S. Supreme Court.

It is, therefore, respectfully submitted that entry of the decree enforcing the Board's Order, which has been sub-

mitted by counsel for the Petitioner National Labor Relations Board, be held in abeyance or stayed pending decision of the United States Supreme Court in the *Plastics* case.

Dated at Milwaukee, Wisconsin, March 21, 1955.

Respectfully submitted,

/s/ Morris Karon,
Attorney for Respondent
Wagner Iron Works,
710 N. Plankinton Ave.,
Milwaukee 3, Wis.

APPENDIX E.

Order Denying Motion to Stay Entry of Decree.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.
Entered April 14, 1955.

Before:

Hon. WALTER C. LINDLEY, *Circuit Judge.*
Hon. H. NATHAN SWAIM, *Circuit Judge.*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
No. 11121 *vs.*
WAGNER IRON WORKS, *et al.*, *Respondents.*

Petition for Enforcement of an order of the National Labor Relations Board.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner,*
No. 11141 *vs.*
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review of an order of the National Labor Relations Board.

It Is Ordered by the Court that the motion of respondent Wagner Iron Works to stay entry of decree be, and the same is hereby denied; and the objections of respondent Wagner Iron Works to the form of the decree prepared and submitted by the National Labor Relations Board are hereby overruled.

It Is Further Ordered by the Court that the decree is prepared and submitted by the National Labor Relations Board be entered this date.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 185

WAGNER IRON WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO); AND BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Government does not oppose the granting of certiorari with respect to Questions 1 and 2 in the petition. Although we believe that the decision of the court below is correct, for the reasons summarized therein, Questions 1 and 2 are identical with those presented in *Mastro Plastics* v. *National Labor Relations Board,* in which this Court has granted

certiorari.[1] 348 U. S. 910, No. 19, October Term, 1955.

2. Petitioner's Question 3 presents no issue for review by this Court. Section 10 (a) of the National Labor Relations Act[2] makes it clear that agreements providing for the arbitration of labor disputes cannot serve to displace the Board's exclusive jurisdiction to prevent unfair labor practices defined in the statute. *National*

---

[1] There is one important factual difference between the instant case and *Mastro Plastics* which possibly could bring about a different legal conclusion. In the latter case the strike alleged by the employer to be in violation of Section 8 (d) of the National Labor Relations Act was called by the union which was a party to a collective bargaining agreement with the employer. In the instant case the strike was called by a union which was not a party to the collective bargaining agreement. Section 8 (d) provides that "no party to such contract shall terminate or modify such contract" without observing the requirements prescribed therein. The court below, concurring in the views of the Second Circuit in *Mastro Plastics*, 214 F. 2d 462, held generally that Section 8 (d) did not apply to strikes called to protest an employer's unfair labor practices. The court, therefore, did not deem it necessary to pass upon the alternative ground, relied upon by the Board, that in any event Section 8 (d) is inapplicable to such a strike called by a union not a party to the collective bargaining agreement. If certiorari is granted in this case, the Board will of course rely upon the alternative ground as an additional reason for affirmance.

[2] Section 10 (a) reads, in relevant part:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *.

Labor Relations Board v. *UAW, Local 291,* 194 F. 2d 698 (C. A. 7); *National Labor Relations Board* v. *Walt Disney Productions,* 146 F. 2d 44, 48 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board* v. *Bell Aircraft Corporation,* 206 F. 2d 235, 237 (C. A. 2); cf. *National Labor Relations Board* v. *General Motors Corporation,* 116 F. 2d 306, 312 (C. A. 7). There are no contrary decisions. Accordingly, the petition for a writ of certiorari should be denied so far as it relates to Question 3.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

JULY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
SEP 28 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 185

WAGNER IRON WORKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNICN, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO); AND BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY MEMORANDUM OF THE PETITIONER WAGNER IRON WORKS.

MORRIS KARON,
Counsel for Petitioner,
710 N. Plankinton Ave.,
Milwaukee 3, Wisconsin.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 185.

WAGNER IRON WORKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO); AND BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471 (AFL),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY MEMORANDUM OF THE PETITIONER WAGNER IRON WORKS.

I. Reply to National Labor Relations Board's Memorandum.

1. The statement in the National Labor Relations Board's Memorandum, that the Government does not oppose the granting of certiorari respecting Questions 1 and 2 in the Petition, is an admission that the Wagner

Petition for Certiorari is well-founded and should be granted.

2. The suggestion in the footnote on Page 2 of the NLRB's Memorandum that "there is one important factual difference between the *Mastro Plastics* case and the *Wagner* case, which possibly could bring about a different legal conclusion", because in this case "the strike was called by union which was not a party to the collective bargaining agreement" while in the *Mastro Plastics* case "the strike was called by the union which was a party to the collective bargaining agreement", is clearly erroneous. The contention of the National Labor Relations Board in the Court below (which that Court ignored) that Section 8(d) of the Labor Management Relations Act is inapplicable to a strike called by a union not a party to the collective bargaining agreement, strikes us as absurd. There is no such thing as a "strike" by a union. Since a union cannot *work,* neither can it *strike.* A union can urge employees to strike, but the union itself obviously cannot strike. A strike must necessarily be by workers; and only a strike by employees can cause damage. The employees who struck in this case were parties to the collective bargaining agreement, which agreement was made for them by their AFL Union as their agent—their "agent for and acting in behalf of the Company's production employees" (Bd. Exh. 6, B. A. 881, W. A. 185). Therefore, the strike by the employees who were parties to the labor contract, was in violation of Section 8(d) of the Labor Management Relations Act.

3. Furthermore, a person who causes a breach of contract is not immune from liability merely because he is not a party to the contract. On the contrary, a third party who interferes with another's contract, or causes a breach thereof, is liable for the damages he causes, or he may be

enjoined.[1] For the Board to argue that a labor union (or anyone else) may cause a breach of contract between contracting parties with impunity, is to argue for a novel, lawless and vicious doctrine.

4. NLRB counsel also question the propriety of reviewing the Petitioner's Question 3, by arguing that Section 10(a) of the Labor Management Relations Act provides that agreements for the arbitration of labor disputes cannot displace the Board's exclusive jurisdiction to prevent unfair labor practices. That argument is beside the point presented by Petitioner's Question 3. The provision of Section 10(a) invoked by the Board merely means that employers and employees cannot contract to oust the Board's jurisdiction to enjoin unfair labor practices. However, that should not prevent the parties to a labor contract from agreeing to arbitrate disputes arising between them. We submit that a dispute should not be adjudged an unfair labor practice when an existing contract requires the parties to submit the dispute to arbitration.

5. Arbitration should be favored by the Board as well as by the Courts, instead of being condemned or ignored. Arbitration of labor disputes is far more preferable to proceedings before the Board. Anybody who has had experience in the labor-management relations field would choose arbitration every time, in preference to the endless and expensive proceedings before the Board.

6. Centuries ago, because of their jealousy for their own jurisdiction, the English courts refused to enforce agreements for arbitration of disputes upon the ground

1. *Angle* v. *Chicago, etc. R. Co.*, 151 U. S. 1.
Bitterman v. *Louisville & N. R. Co.*, 207 U. S. 205.
Hustings Co. v. *Coca Cola Co.*, 205 Wis. 356, 365, 237 N. W. 85.
Johnson v. *Aetna Life Ins. Co.*, 158 Wis. 56, 147 N. W. 32.
24 A. L. R. 43, 46, 52-61 (citing scores of cases).
26 A. L. R. (2d) 1234, *et seq.*

that the courts were thereby ousted from their jurisdiction. This jealousy became embedded in the common law and was for a time adopted by American courts, though the American courts criticized the rule as illogical and unjust.

7. Congress finally abolished the old common law rule by enacting the Federal Arbitration Act (9 U. S. C. A. Sec. 1, *et seq.*). Today agreements for the arbitration of disputes are generally held valid.

8. As said in 3 Am. Jur. 835 (Sec. 4):

> "* * * the very decided tendency of modern authorities is away from the more artificial doctrine of the older decisions and in the direction of the more intelligent view that arbitration, as an inexpensive, speedy, and amicable method of settling disputes, and as a means of avoiding litigation, should receive every encouragement from the courts which may be extended without contravening sound public policy or settled law." (Citing *Burchell* v. *March*, 17 How. (U. S.) 344, 15 L. Ed. 96, where the court said that arbitration should receive every encouragement from courts of equity.)

9. If the mandatory arbitration provision in the labor contract here involved (Contract, Sec. 15A, W. A. 191) depends upon the rule of *lex loci contractu*, as we think it clearly does (15 C. J. S. 854 (3)) then Wisconsin law should apply. Under Wisconsin law, as pointed out in our Petition for the Writ of Certiorari, P. 25, the arbitration provision in the labor contract is specifically enforceable and recent decisions of this Court seem to be to the same effect.

10. Surely, it is time to declare that unions and employees must abide by their contracts, no less than employers. Also, that when a labor contract provides for the arbitration of labor disputes, such provision is enforceable. For arbitration of labor disputes is far, far better than the endless, expensive and often futile proceedings before the Board.

II. Reply to CIO Union's "Cross-Petition for Writ of Certiorari".

1. The CIO Union has filed a Cross-Petition for a Writ of Certiorari in the above case, seeking to review that part of the decree of the lower court which denied enforcement of the National Labor Relations Board's order for reinstatement of 22 night-shift workers.

2. The CIO's Cross-Petition presents no issue for review by this Court. The CIO's brief (Page 7) admits that even if the Board's order for reinstatement of 22 of the night-shift employees was correct and the refusal of the Court of Appeals to enforce it was erroneous, that would not support an independent Petition for a Writ of Certiorari. We submit that admission puts the CIO out of court.

3. The claim on Page 7 of the CIO's Cross-Petition, that the decision below is a misapplication of *R. R. Donnelley & Sons Co.* v. *NLRB*, 156 Fed. (2d) 416 (C. A. 7), is groundless. On the contrary, the Court below cited and followed the *Donnelley* case (see Opinion below, Wagner Petition for Certiorari, P. B-11). At any rate, since it is a decision by the same Court of Appeals, it cannot furnish a ground for certiorari by this Court.

4. There is no justification for the statement in the CIO Cross-Petition, Page 7, that the status of the 22 night-shift employees "was treated quite cursorily" by the lower court, in face of the very exhaustive 28 page Opinion of the lower Court.

5. The reason the Court below refused enforcement of the Board's order directing reinstatement of the 22 night-shift employees was that there is simply no basis for the

Board's ruling that the 22 night-shift employees were discharged to discourage CIO Union activity. The Company's positive and uncontradicted evidence was that 22 of the 55 night-shift employees were laid off in order to reduce its less efficient and more expensive night-shift operation and thereby to increase its more efficient and less expensive day-shift operation (W. A. 155-180, 75, 129-130, 144).

6. The Board and Board counsel themselves proved the obvious error of their conclusion that the CIO Union activity was the reason for the layoff. For their own star witness, CIO organizer Chiakulis, claimed the night shift was 100% solid CIO. Thus, in one breath they claimed that the 22 employees were laid off for CIO sympathy; in the next breath they claimed that all 55 men on the night-shift were CIO adherents. Since the other 33 night-shift employees were retained by the Company, if the layoff of 22 CIO adherents constituted discrimination against the CIO, then contrariwise we presume the retention of 33 CIO men constituted *favoring* the CIO to a greater degree. Since the Company retained more of the CIO night-shift employees than it laid off, the claim that the layoff was because the men laid off were pro-CIO was an obvious perversion. It was an attempt to ride two horses running in opposite directions at the same time. The lower Court had to reject the claim that the 22 night-shift employees were laid off to discourage CIO Union activities.

Conclusion.

We therefore, respectfully submit:

1. That Petitioner Wagner Iron Works' Question 3 should be reviewed by this Court, as well as Questions 1 and 2.

2. That the CIO Union's Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MORRIS KARON,
Counsel for Petitioner,
710 N. Plankinton Ave.,
Milwaukee 3, Wisconsin.

Dated at Milwaukee, Wisconsin,
September 19, 1955.

FILED
SEP 10 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 381

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO),

Petitioner,

vs.

WAGNER IRON WORKS,

Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI.

MAX RASKIN,
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Dated September 8, 1955.

THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO),

Petitioner,

vs.

WAGNER IRON WORKS,

Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI.

Petitioner, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), respectfully prays that a cross-petition for a writ of certiorari issue to review the decree of the United States Court of Appeals for the Seventh Circuit, entered on April 14th, 1955, enforcing in part and denying in part an Order of the National Labor Relations Board dated April 29th, 1953.

On June 28th, 1955, the Wagner Iron Works filed a petition for a writ of certiorari to that part of the decree enforcing the Board's Order for reinstatement of 64 employees (Oct. Term, 1955, Case No. 185).

The review herein prayed for is to that part, and only that part, of the decree which denied enforcement of the Board's Order reinstating 22 night shift employees of the Wagner Iron Works.

OPINION BELOW.

The Intermediate Report of the Trial Examiner is printed in the Appendix to the National Labor Relations Board's Brief in the U. S. Court of Appeals at pp. 55 to 145.

The Opinion of the National Labor Relations Board is reported in 104 N. L. R. B. 445 and is printed in the Board's Appendix, pp. 169 to 180.

The Opinion of the Court of Appeals is reported in 220 Fed. (2d) 126 and is printed herein as Appendix A.

JURISDICTION.

The Opinion of the Court of Appeals was filed March 7th, 1955. Motion for rehearing was denied April 5th, 1955.

The Decree of the Court of Appeals was entered April 14th, 1955.

On July 12th, 1955, the statutory time not having expired, an extension of time to September 12th, 1955, in which to file this cross-petition, was granted by Justice Sherman Minton, in accordance with Rule 22 (4).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1); 62 Stat. 928.

QUESTION PRESENTED.

Does that part of the decree of the U. S. Court of Appeals for the Seventh Circuit, denying enforcement of the National Labor Relations Board's Order reinstating 22 night shift workers, contravene the Labor Management Relations Act of 1947?

STATUTES INVOLVED.

Sections 7 and 8(a)(1)(3) of the Labor Management Relations Act of 1947, as amended, the material parts of which read as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"

STATEMENT OF THE CASE.

The decree of the U. S. Court of Appeals for the Seventh Circuit, entered April 14th, 1955, ordered the enforcement of the Order of the National Labor Relations Board reinstating 64 employees of the Wagner Iron Works.

The Wagner Iron Works has filed a petition for writ of certiorari to review this part of the decree (October Term, 1955, Case No. 185).

The same decree denied enforcement of the Board's Order reinstating 22 night shift workers.

It is of this part of the decree, and only this part, denying enforcement of the Order reinstating the 22 night shift workers, that petitioner requests a review.

In its opinion the Court of Appeals (Appendix A hereto) states its position on this part of the case:

> "DISCHARGE OF THE TWENTY-TWO NIGHT SHIFT EMPLOYEES.
>
> The Board ordered reinstatement of twenty-two night shift employees who, it found, had been discharged in order to discourage CIO activity. The Company offered proof that the discharges and the resulting realignment of the night shift were prompted by a building expansion program designed eventually to eliminate all night operation.
>
> After reviewing the evidence, we think it clear that the Board did not sustain the burden of proving that these discharges were discriminatory. The record does not disclose the union affiliation or leanings of any of the discharged employees. It does not support the essential finding that the Company knew of the CIO membership or leanings, real or presumed, of the discharged employees. See *NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (CA-7). There appears of record only the evidence that these men were discharged during the representation campaign, the testimony of conversations in which Werner was quoted as saying that he had loyal employees reporting to him

and knew what was going on, and the testimony of a witness who quoted foreman Wotta as saying that Dyskow had told him, Wotta, that the night work would not be resumed at full force because he didn't want the CIO activity to be resumed.

The finding that the discharge of these men was discriminatory cannot be sustained by speculation drawn from the flimsy evidence presented that the Company knew of their CIO activity if any."

The events leading up to the present situation involving the 22 night shift workers can be most clearly and briefly stated by summarizing the Findings of Fact of the National Labor Relations Board.

Record citations will be to the N. L. R. B. Appendix, and cited as B. A. ____.

"For about 14 years prior to the events in this case, the Company had maintained contractual relations with the AFL (B. A. 62; 279). Pursuant to its contract of July 1, 1950 (B. A. 881) the AFL on April 5, 1951 gave the Company notice of its desire to negotiate a new contract (B. A. 62; G. C. Exh. 25).

The following month, a number of employees became dissatisfied with the representation of the AFL (B. A. 62; 348, 370). Thus, a dispute arose over the interpretation of a contractual provision governing holiday pay. Because he disagreed with the interpretation adopted by both the AFL and the Company, Employee Don McMahon, an AFL committeeman who was later discharged, conferred with officials of the CIO regarding the disputed question (B. A. 66; 370-371). In addition, some of the AFL stewards and committeemen had been handicapped in effectively adjusting grievances because they had never been furnished with, and in fact had never seen, a copy of the contract between the AFL and the Company (B. A. 66; 302, 699). Finally, about the middle of May, rumors began to circulate that the AFL had signed or was about to sign a new contract with the Company without first submitting it to the membership for approval (B. A. 67; 302-303).

On May 23, two employees, AFL Steward Steffes and AFL committeeman Gould, obtained permission from Assistant Superintendent Schnuck to leave the plant an hour early, and set out to verify these rumors concerning signing the new contract without prior membership approval (B. A. 67; 235-236; 302-303). Convinced that the rumors were true, Gould and Steffes requested the CIO to organize the employees at the plant and during the next few days themselves solicited the employees to become members of the CIO (B. A. 67; 304-308).

• • • • •

On the afternoon of May 29th, at a meeting of the Company's night shift employees, CIO Organizer Chiakulas reported that the night shift was almost entirely signed up (B. A. 76; 211-212). Two days later, on May 31st, the CIO filed a petition for certification with the Board (B. A. 62; 212-213).

On June 4, the Company discharged AFL Committeeman Don McMahon, who had conferred with CIO officials (*supra*, p. 4), and his brother, Roy McMahon (B. A. 73; 367, 400-401).

• • • • •

On the following day, AFL Chief Steward Handon informed Employees Witz and Karns that he had had the McMahons discharged because they were stool pigeons and were supporting the CIO (B. A. 75; 356, 874).

As already mentioned, 55 rank and file employees on the night shift had almost entirely joined the CIO. On June 4, the same day that the McMahons were discharged, 22 of the night shift employees were discharged and 13 were transferred to the day shift (B. A. 76; 760). Although the Company's contract with the AFL contained a requirement that reductions in force shall be effected with regard to seniority, the Company ignored such requirement (B. A. 76-77; 882, 949). In addition, such discharges were made despite an admitted shortage of production and maintenance personnel on both the day and night shift, and the Company subsequently hired a total of 125 employees (B. A. 79)."

REASONS FOR GRANTING THE WRIT.

While Petitioner believes that the Board's Order as to the reinstatement of the 22 night shift workers was correct, and the refusal by the U. S. Court of Appeals to enforce it was erroneous, it does not contend that standing alone it would support an independent petition for a writ of certiorari.

The Board's Order, insofar as it directs reinstatement of 64 employees, is a routine finding of unfair labor practices for which the U. S. Court of Appeals found substantial basis in fact in the record.

With respect to the twenty-two night shift employees, ordered reinstated by the Board but refused enforcement by the Court of Appeals, your petitioner herein represents that their right to reinstatement depends, in part, upon the application of *R. R. Donnelley & Sons Co.* v. *N. L. R. B.*, 156 F. 2d 416 (CA-7), cert. denied 329 U. S. 810. These twenty-two employees were discharged as a group and as a stratagem to discourage UAW CIO union activity. We believe the decision denying enforcement of the Board's Order reinstating the twenty-two night shift employees is a misapplication of *R. R. Donnelley & Sons Co.* v. *N. L. R. B.*, *supra*, and ignores the statutory provisions of the Act.

On June 28th, 1955, the Wagner Iron Works filed its petition for a writ of certiorari, October Term, 1955, Case Number 185, to review the decision of the U. S. Court of Appeals enforcing the National Labor Relations Board's order reinstating to employment the sixty-four employees of the Company.

As but twenty-two of the total eighty-six employees were refused reinstatement by the Court of Appeals' decision, and their status was treated quite cursorily, this case might not be sufficiently important to warrant an in-

dependent Petition for Writ of Certiorari, despite the misapplication of *R. R. Donnelley & Sons Co.* v. *NLRB, supra.* However, if the Court sees fit to grant the Wagner Iron Works' petition for writ of certiorari in Case Number 185, we believe that it should review the entire case and correct the plain error of the court below with respect to the refusal to enforce the Board's Order relating to the twenty-two night shift employees.

The Company did not discharge these twenty-two night shift workers for their *individual* union activities.

The Company discharged them as a group to discourage the CIO union activity, because of the large percentage of CIO adherents on the night shift (B. A. 76; 211, 212).

CONCLUSION.

Petitioner sincerely contends that if a review of part of the judgment is granted on the petition of the Wagner Iron Works, a review of that part of the same judgment requested by petitioner herein should also be granted.

Respectfully submitted,

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Milwaukee, Wisconsin,
Counsel for Petitioner.

Dated September 8, 1955.

APPENDIX A.

Opinion of Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1954, JANUARY SESSION, 1955.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
No. 11121 *vs.*
WAGNER IRON WORKS and BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS SHOPMEN'S LOCAL 471, (AFL),
Respondents.

} On Petition for Enforcement of an Order of the National Labor Relations Board.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO,
Petitioner,
No. 11141 *vs.*
NATIONAL LABOR RELATIONS BOARD,
Respondent.

} On Petition for Review of a Portion of an Order of the National Labor Relations Board.

March 7, 1955.

Before LINDLEY, SWAIM, and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* In No. 11121 National Labor Relations Board petitions for enforcement of its order restraining respondents, Wagner Iron Works and Struc-

tural & Ornamental Iron Workers Shopmen's Local 471, AFL, from further commission of certain allegedly unfair labor practices proscribed by the National Labor Relations Act, as amended, 29 U. S. C. A. §§ 151 *et seq.*, and requiring of each certain affirmative action (109 NLRB 445). In No. 11141, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, seeks to set aside that part of the same order dismissing the portion of the complaint which charged that the Wagner Company had wrongfully discharged certain named employees. Petitioner in No. 11141 was the charging party in all proceedings before the Board which are here for review. Two groups not parties to this cause were eventually active in the matters involved, namely, the Temporary Committee, which came into being at the Wagner plant as an interin. agent of its employees, and its successor, the Employees' Independent Union. We shall refer to the parties as the Board, the Company, AFL, CIO, the Temporary Committee and the Independent, respectively.

For some 14 years AFL had represented the Company's employees as bargaining agent, under an agreement defining their relationship and their several obligations as employer and employees. The last contract, dated July 1, 1950, to continue for one year, was automatically renewable, unless terminated by 60 days' notice. On April 15, 1951, AFL notified the Company that it desired to terminate the agreement as of June 30, and to negotiate a new one.

Earlier in the year, certain employees had become dissatisfied with their representation by AFL. They complained that they had never seen the agreement and that union committeemen had been denied opportunity to examine its text and were, therefore, seriously handicapped in the adjustment of grievances. In May a dispute de-

veloped as to the interpretation adopted by the Company and AFL of the contractual provision governing holiday pay. AFL Committeeman Don McMahon approached and conferred with officials of the rival CIO regarding it. Later other employees, fearing that AFL intended to sign a new agreement with the Company without first submitting it to them, discussed their situation with CIO representatives and requested that union to organize the plant. The prime movers in this venture, employees Steffes and Gould, AFL steward and committeeman, respectively, became active in the CIO membership drive, which began in the latter part of May. To this end, with the consent of their immediate supervisor, these men absented themselves from work on May 24 and 25, to solicit employees to join CIO. On Saturday, May 26, they reported for work, but, after spending an hour and twenty minutes at the plant, sought and obtained leave to take the remainder of the day off. When they reported for work on May 28, they were discharged.

On the same day, CIO notified the employer that it represented "an overwhelming majority" of the employees and, on May 31, it filed a petition for certification. On June 6, the Company and AFL consented that an election be held on June 18, and the Company posted a statement of neutrality. A tug of war then ensued between CIO and AFL in their struggle to win the election. Despite its protestation of neutrality, the Company, practically from the outset, sided openly with AFL, championing the cause of that union and attempting to defeat CIO. Thus, Company Vice-President Werner testified that he attempted "to enlist AFL help so they could beat the CIO." Meanwhile, on June 4, Don McMahon and his brother Roy were discharged, and a realignment of the Company's 55 men

night shift was effectuated whereby 22 night employees were discharged and 18 transferred to the day shift. Both actions were approved by AFL.

On June 14 CIO filed its amended charge before the Board that the company had acted discriminatorily in discharging Gould, Steffes, the McMahons and the 22 night shift employees. It also filed a waiver of its right to object to the result of the election, because of the pendency of the charges.

AFL organizer Modell testified at the hearing that having become convinced that AFL was in danger of losing the election he asked Vice-President Werner in June to try to "have it held up for a bit". "I said * * * it was my opinion that * * * where an election was agreed to * * * any unfair labor charges would be dropped. He says to me, 'That was my opinion too.' * * * 'What can I do about it?' I says, 'Well, I don't know, but I suggest you do something about it.'" *Modell* said further that he "was anxious * * * to stop the election", but didn't recall whether he suggested that the employer withdraw its consent. *Werner* testified that he talked to an AFL official, probably Modell, between the 6th and 15th of June, concerning the possibility of AFL winning the election but could not recall what was said. At any rate, on June 15, the Company withdrew its consent to the election. Werner testified that he called the Board's regional office and explained that the Company had consented to the election on the mistaken premise that the unfair practice charges had been withdrawn rather than waived merely for the purposes of the election.

Shortly thereafter, on June 20, the CIO adherents voted to strike and formed a picket line at the plant. AFL promptly notified the strikers that their action was unauthorized and directed them to return to work. On June

22, the Company notified many of the strikers that their employment was terminated, asserting that their action amounted to a breach of the no-strike clause of the contract.

On June 26 the Board conducted a representation hearing. That evening the CIO supporters voted to terminate the strike. The walkout ended the next day and the strikers offered to return to work. Some were reinstated; some were not. Three of those reinstated subsequently quit when the Company insisted they fill out new applications and start new, with loss of seniority rights.

No further contract negotiations occurred. The Company continued to deal with AFL as bargaining agent under the terms of the 1950 agreement until January 1952, when the Temporary Committee was established as interim bargaining agent. In February or early March 1952, at a meeting called by the Temporary Committee, the employees voted to organize a new union, as a result of which Independent came into being. From then on, until as late as May 13, 1952, the Company dealt with Independent concerning grievances and working conditions.

On July 13, 1951, CIO filed further specifications of charges, including a claim of statutory violations on the part of the company by interfering with the employees' right to choose their own bargaining agent, and another against AFL charging interference with employees in their choice of a bargaining agent. Pursuant to an order consolidating the charges, a complaint was filed on March 11, 1952, averring in substance that: the company had engaged in unfair labor practices in violation of Sections 8 (a)(1), (2), and (3) of the Act, 29 U. S. C. A. §§ 158(a)(1), (2), (3), by: (a) a continuous course of conduct by which it assisted and dominated AFL, and, subsequently, the Temporary Committee; (b) discriminatorily discharging Gould, Stefres, the McMahons, Smejkel and the 22 night shift employees; (c) discriminatorily discharging 66 em-

ployees who had participated in the strike and constructively discharging four named employees; and (d) engaging in other specified acts of interference with and coercion of its employees in their right to select a bargaining agent. On April 29, 1952, the trial Examiner permitted an amendment adding the Independent as a respondent and averring that the Company had unlawfully assisted and dominated it. The complaint further charged that AFL had engaged in unfair labor practices in violation of §§ 8 (b) (1) (A) and (2), 29 U. S. C. A. §§ 158 (b) (1) (A), (2), by: (a) attempting to cause the Company to discharge discriminatorily Don and Roy McMahon, and (b) pursuing a course of conduct tending to interfere with and coerce employees in their choice of bargaining agent.

On November 6, 1952, the examiner filed his report suggesting an order sustaining the complaint except as to the charge that the Company had wrongfully discharged the ten men mentioned in CIO's petition in Cause No. 11141. On April 28, 1953, the Board entered its decision adopting the examiner's findings and entering an order accordingly. As to the ten employees involved in Cause No. 11141, the Board concluded that the Company discharged one of them, Smejkel, solely because of misconduct, and that there was no evidence in the record that the remaining nine, discharged at the time of the strike, were discharged for CIO participation or that they ever sought or were refused reinstatement.

The Company was ordered to reinstate, with back pay, Gould, Steffes, the McMahons, the twenty-two night shift employees, fifty-seven unfair labor practice strikers and three men which the Board found to have been constructively discharged after their reinstatement following the strike. AFL was ordered, *inter alia,* to notify the Company that it had no objection to the reinstatement of the McMahons and to make the McMahons whole.

Validity of the Order Against AFL.

Although counsel for AFL filed an appearance, no answer or brief was offered and no representative appeared on its behalf on oral argument before us. A question as to the effect of this status having been raised by the Court at the hearing, subsequent to oral argument, on December 9, a letter from counsel was lodged with the Clerk, without objection, advancing the postulate that the position of AFL is the same as that of the Company and that it adopts the brief and argument of the latter. Two theories are advanced for this position, namely, that the rights and duties of the Company and AFL under the collective bargaining agreement of July 1, 1950 are correlative, or, in the alternative, that the liability *ex delicto* of AFL depends upon the culpability of the Company, and that, a judgment relative to the company should control disposition as to AFL. These theories, unfortunately, are not applicable. The unfair labor practices charged against the respective respondents do not grow out of interpretation or application of the contract. The only possible question before us relative to the agreement is whether the acts charged may be justified as legitimate action by respondents in the protection of their respective contract rights. Since the acts of the employer and those of AFL were those of separate entities effectuated by the agency of their respective officers and representatives, there can be no correlation or inter-dependence in the separate acts of the two respondents.

The tort aspect of AFL's position is equally untenable. The consolidated complaint charged that various activities of the Company and its supervisory personnel were unfair practices. Two separate courses of activity were specified against AFL, namely, coercion of employees by its chief steward and its contribution to the employer's discharge of the McMahons. The Board sustained both charges. The

first is in no sense derivative, while the latter is only partly so. The Board found that an officer of the AFL attempted to cause and did cause the Company to discharge the McMahons discriminatorily. Even if we should set aside the finding that the discharge was in fact discriminatory, the finding that AFL caused the discriminatory discharge, being derivative, would fall, but the finding of an attempt would still remain, and it is, of itself, a violation of Section 8 (b) (2).

A petition for enforcement of an order is a special statutory proceeding in which the Court alone may make the order coercively effective. *NLRB* v. *Ford Motor Co.*, 119 F. 2d 326 (CA-5). It is a combination of an appeal from the order and an original proceeding to enforce it. *NLRB* v. *Kellburn Mfg. Co., Inc.*, 149 F. 2d 686 (CA-2). In one sense, our function is that of a Court reviewing the record to determine whether the findings are sustained by the evidence; there the burden is on the respondent to show want of substantial support. In another sense, our function is that of exercise of original jurisdiction, to determine whether and to what extent the order should be enforced or set aside. *NLRB* v. *Kilburn Mfg. Co., Inc., supra.* In the latter situation the Board appears as a litigant, who must sustain the burden of showing its right to enforcement, *NLRB* v. *Ford Motor Co., supra;* See *Magnolia Petroleum Co.* v. *NLRB,* 112 F. 2d 545 (CA-5), *i. e.,* that the order is supported by the findings and is in compliance with the statute. *NLRB* v. *Kellburn Mfg. Co., Inc., supra.*

AFL, having failed to answer the petition or otherwise defend is a party in default. This situation is the same as that in the *Kellburn* case, *supra,* in which the employer failed to defend an enforcement proceeding. We agree with the view therein expressed, that the defaulting respondent must be held to have confessed the allegations

of the petition, insofar as they relate to the appeal phase of the proceedings, *i.e.*, the substantial evidence question, and that our only function, therefore, is to examine the findings to see whether they support the order and whether the order complies with the statute, issues on which the Board bears the burden of proof. We conclude as a matter of law that the Board has sustained the burden on each issue and that the order is amply supported by the findings of coercion and of the attempt to cause the Company to discharge discriminately the McMahon brothers. Judgment for enforcement will be entered against the AFL.

Validity of the Order Against the Company.

Ultimately, whether enforcement is to be decreed depends primarily on whether the findings are supported by substantial evidence "when viewed in the light that the record in its entirety furnishes." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488. The controversy here involves the sufficiency of the evidence to support the findings of fact as to: (a) Acts of discrimination prior to the strike said to violate Section 8 (a) (1) and (3); (b) Acts of support and domination of unions as violative of Section 8 (a) (2); (c) Acts of interference and restraint of employees in their right to choose a collective bargaining agent as violative of Section 8 (a) (1); and (d) Acts of discrimination in employment subsequent to the strike. The Company asserts cause for action peculiar to each group.

Discrimination Prior to the Strike.

Obviously, the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is em-

ployed as a discriminatory device. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *U. S. Steel Co.* v. *NLRB*, 196 F. 2d 459, 465-6 (CA-7). The Board may not "substitute its judgment for that of the employer as to what is sufficient cause for discharge," *NLRB* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 264 (CA-5), and discrimination may not be inferred from an employee's mere membership in a union. *Indiana Metal Products Corp.* v. *NLRB*, 202 F. 2d 613 (CA-7); *NLRB* v. *William Davies Co.*, 135 F. 2d 179, 183, cert. denied 320 U. S. 770 (CA-7). In every case the burden is on the Board to prove that an employee's discharge resulted from his union activities. *Indiana Metal Products Corp.* v. *NLRB*, *supra*; *NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680, 690 (CA-7). We review the pertinent separate findings of the Board with these principles in mind.

The Discharge of Gould and Steffes.

Gould and Steffes, who were, as previously noted, leaders in the efforts of the CIO to organize, were discharged when they reported for work on Monday, May 28, 1951, as the Board found, because of their union activity. The Board rejected as a mere pretext the Company's contention that they were discharged because they had reported to work the preceding Saturday while intoxicated.

After examination of the records we are unable to say that this finding is not supported by adequate substantial evidence. These men were employed on the night shift, under assistant Superintendent Schnuck and foremen Bartsch and Golner. They testified that they received permission from Schnuck to absent themselves from work for a part of the night of May 23 and for the nights of May 24 and 25. This time they devoted to meetings with CIO officials and solicitation of employees for CIO.

Schnuck admitted that he excused them from work on these days. Saturday morning, May 26, the two men spent, for the most part, in nearby taverns soliciting such of the employees as were present, on behalf of CIO. At noon, they reported for work. Shortly later, Gould asked a fellow employee, Barbian, and Foreman Golner to join the CIO. After working about an hour and twenty minutes both Gould and Steffes sought and received permission from Schnuck to take the rest of the day off, during which time they continued their rounds of employee hangouts soliciting adherents for CIO.

When they reported the following Monday, May 28, they were discharged. Both testified that they were informed by Schnuck that they were discharged for passing out CIO cards; and the AFL chief steward Handon was called in to confirm the charge. Employee Bestul testified that shortly after the two were discharged, Schnuck saw Bestul talking to Steffes and ordered him off the premises, saying that he was fired. Bestul's testimony as to this conversation follows: "Mr. Schnuck came up to me, and he said * * * 'Jake and Johnny were fired for being drunk * * *' I said, 'Johnny Gould was helping me * * * and I never knew that that man was drunk. In fact, I did not know that that man had been drinking at all.' To which Mr. Schnuck said, 'Oh, yes, he was loaded.' I said, 'If he was loaded, why didn't the Company send him home?' Mr. Schnuck said, 'Well, I was just going to send him home.' Then he went on to talk about the CIO. He said, 'After all Johnny and Jake are radical about the CIO,' and he says, 'Furthermore, they cannot switch unions. We had an election here * * * it doesn't do them any good to try to get the CIO in now.' "

Employee Don McMahon reported his conversation with Schnuck as follows: "After I punched out Tom asked me if I had heard * * * that Johnny Gould and Jake

Steffes were trying to get the CIO in there, and I told him no, * * * and he says, 'Well, that's no good, we are making out pretty good with the AFL already. We will have to see if we can't do something about that,' and I agreed with him * * * 'we don't want anything like that, all we'll have is a bunch of strikes and stuff on our hands, and we've been coming along pretty well with the AFL * * *'" These conversations were not denied, except that Schnuck testified that he did not recall Bestul telling him that Gould had not been intoxicated and, further, that he discharged the men because of reports that they had been drunk.

The evidence as to the men's intoxication was in conflict. Gould and Steffes testified that they spent Saturday morning soliciting for CIO in bars near the plant and that each, during that time, had one or two glasses of beer. Another employee, Ebbinger, testified that he met them at a bar in the morning; that they left about 10:30 and went to Gould's apartment where they discussed the union problem; that he was with them from 9 to about 11:45 A. M., when he left; that he again met the two men at the plant gate at noon and went into the plant with them; that neither was drunk; and that during the time he was with them in the morning, they were not drinking heavily, but had "about one glass" of beer. Employees Bestul, Roy McMahon and Pattenege testified that they had seen Gould and Steffes at work that Saturday and that their demeanor and actions did not indicate that either had been drinking.

On the other hand, foremen Bartsch and Golner and employee Manhoff testified that Gould and Steffes were intoxicated when they reported for work on the afternoon in question. Schnuck testified that Bartsch and Manhoff reported to him, between noon and the time when Gould and Steffes left on that day, that the two were

drunk. Manhoff said that although Steffes was intoxicated, he reported that fact only to Bartsch sometime the following week. Bartsch testified that Gould was drunk while at work on the day in question, but that he didn't report that fact to anyone that day. Golner testified that on the afternoon in question he had reported to Schnuck that Gould was passing out CIO cards and that he and Steffes were intoxicated. The examiner expressly discredited Golner's testimony on this point. He found it impeached by the fact that Golner admitted that his testimony was in conflict with statements made by him in a pretrial affidavit in which he had stated that on the afternoon in question he had reported to Schnuck that Gould was soliciting for CIO, but had said nothing about them being drunk. Further, it is undisputed that during the time Gould was at work that day, Golner assigned him to help Bestul on a saw, a task which all witnesses agree was hazardous and not safe for anyone under the influence of alcohol.

Thus, whether the two men were intoxicated in the afternoon and whether Schnuck had any knowledge of that fact, if true, was largely a question of credence of witnesses. We cannot say on the record as a whole that the finding that they were discharged because of their union activity is not adequately supported by substantial evidence. Two opposing inferences might have been equally reasonable, but we are not justified in ignoring the advantage which the examiner had in judging the witnesses' credibility, *NLRB* v. *Dinion Coil Co.*, 201 F. 2d 484 (CA-2), or in displacing the Board's choice between two fairly conflicting views. *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529, cert. denied 346 U. S. 909 (CA-7). Under this record the Board did not unreasonably infer from the circumstances that union activity was the reason for the discharge of the two men. *R. R. Donnelley & Sons Co.* v. *NLRB*, 156 F. 2d 416 (CA-7), cert. denied 329 U. S. 810.

Discharge of the McMahon Brothers.

As we have observed, the Board found that Don and Roy McMahon were discriminatorily discharged because of their activities on behalf of CIO. The evidence indicates that Roy was an early adherent to and an active campaigner on behalf of CIO. Don, who had discussed the holiday pay question with CIO representatives, apparently remained loyal to AFL in the representation dispute. Roy's foreman, Krueger, testified that on June 4, he was questioned by Superintendent Dyskow, as to whether he had missed any of his men on the afternoon of May 29. Krueger replied in the negative. Dyskow then said that Roy McMahon had been seen in a tavern that afternoon; that his brother Don had punched Roy's card; that an FBI check had revealed Don's fingerprints on the card. The witness said that he had been questioned also by Vice-President Werner who repeated substantially the statement made by the Superintendent. He replied that he told Werner that he knew Roy had not been absent, because he, Krueger, had made the customary check of Roy's production at the end of the shift, and, further, that Werner instructed Dyskow to call in the McMahons and the AFL shop committee, and dismissed Krueger saying, "We won't need you here anymore." According to the undisputed testimony of the McMahons, they were then called into Dyskow's office and discharged in the presence of Werner, Dyskow, President Wagner and the AFL shop committee. The reason then given by Dyskow for the discharge was that Roy had left work about 2:30 P. M. and that Don had punched his brother out at quitting time. Werner was quoted as stating that he had already informed Waldow of the discharge; that the matter should be taken up with AFL and that if he had a man on his committee who was a spy for CIO he would get rid of him. To Don's denial of the spying charge, Werner is

quoted as saying that he had loyal men reporting to him and "We know what is going on."

Witnesses testified that on the following day, some ten or fifteen employees, including Krueger, Barbian and some of the AFL committeemen, went to Dyskow's office, where each, in turn, reported that Roy had been present on the afternoon in question, and that Dyskow listened to them, without comment, except to state that he had information that Roy had been absent and that Don had punched him out.

Neither Werner nor Dyskow testified as to the reasons for the discharge of the McMahons. Werner said, on cross-examination, that he had not procured an FBI check of the time card, and that any statement that he had was false. Assistant-Superintendent Banaszak testified that Roy was absent on the afternoon in question; that he walked past Roy's work station about 2:30 in the afternoon and did not see him at work; that he did not see Roy at his station any time that day, and that he was certain he had made more than one tour of the department during the afternoon. On cross-examination he said that he could not remember the time of any tour except that made at 2:30; that he was sure he made others, because he customarily walked through and checked each section several times in the course of an afternoon; that a man absent from his machine at any particular time might be in the washroom or elsewhere in the building, and that he did not report Roy's absence to anyone prior to Roy's discharge. He testified also that he had seen Don on three occasions punching Roy's time card in the morning; that he had warned Don not to do so and had reported the occurrence to Dyskow, and that the last date when he had seen Don punch Roy's card was May 29. Don admitted that he had made it a practice to punch in the card of the driver of his car pool, while the driver parked the car,

but had refrained from so doing after Banaszak's warning. There was also undisputed testimony that the practice was not unique at the plant. Two witnesses testifying to conversations with AFL chief steward Handon, shortly after the discharge, quoted him as stating that he had had the McMahons fired because they were stool-pigeons for CIO and were undermining AFL. Handon denied these conversations or any such admission on his part. The evidence, we think, affords substantial support for the finding of discrimination.

The Company contends, however, that the Board's case rests solely on inference, hearsay and self-serving statements; that Banaszak's testimony that Don had in fact punched Roy's card on three occasions proves that cause existed for discharge, and, further, that the claim of the McMahons was never submitted to arbitration. Each argument must fail. The testimony stands uncontradicted as to the nature and content of the conversations had just preceding, during and immediately after the discharge. That the testimony of the McMahons was self-serving goes only to the question of their credibility. We are not justified in saying that their testimony was not worthy of belief. The testimony of Krueger, Barbian and other witnesses that they had told Dyskow on June 5 that Roy had not been absent from work on the afternoon in question was certainly competent as to the conversations the witnesses personally had with Dyskow and as to the fact that some ten to fifteen employees sought out Dyskow to report Roy's presence.

Nor can reliance be soundly based on Banaszak's testimony to support unsubstantiality and to prove that these employees were discharged because of the card-punching incidents. For, even if we believed that these events furnished good cause for discharge, on the record, it was not unreasonable for the Board to find that the discharges

were in fact motivated by the employees' CIO activities. *R. R. Donnelley & Sons Co.* v. *NLRB, supra; NLRB* v. *Chautauqua Hardware Corp.*, 208 M. 2d 750, 751 (CA-2).

Failure of the McMahons, Gould and Steffes, to arbitrate the question of the validity of their discharges can be of no avail to the Company. As the procedures of the contract including arbitration were set up in the agreement with AFL, it is extremely doubtful that that union would object seriously to the discharge of CIO adherents, in the course of an all out battle between two unions for representation. The truth of this statement is supported by the testimony of AFL business agent Waldow that he did not object to the discharges and "was not opposed" to them. Though the Company offered to recognize a CIO grievance committee at one time, the offer was withdrawn before effective negotiation could be had. And, since CIO was not a party to the contract, any basis for effective adjustment of grievances by its committee is at best speculative.

Furthermore, arbitration provisions in a bargaining agreement cannot oust the Board's jurisdiction to prevent unfair labor practices. As we said, in *NLRB* v. *International Union, etc.*, 194 F. 2d 698, 702, "the Act confers upon the Board exclusive jurisdiction to prevent unfair labor practices * * *. The Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration."

Discharge of the Twenty-two Night Shift Employees.

The Board ordered reinstatement of twenty-two night shift employees who, it found, had been discharged in order to discourage CIO activity. The Company offered proof that the discharges and the resulting realignment of the night shift were prompted by a building expansion

program designed eventually to eliminate all night operation.

After reviewing the evidence, we think it clear that the Board did not sustain the burden of proving that these discharges were discriminatory. The record does not disclose the union affiliation or leanings of any of the discharged employees. It does not support the essential finding that the Company knew of the CIO membership or leanings, real or presumed, of the discharged employees. See *NLRB* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (CA-7). There appears of record only the evidence that these men were discharged during the representation campaign, the testimony of conversations in which Werner was quoted as saying that he had loyal employees reporting to him and knew what was going on, and the testimony of a witness who quoted foreman Wotta as saying that Dyskow had told him, Wotta, that the night work would not be resumed at full force because he didn't want the CIO activity to be resumed.

The finding that the discharge of these men was discriminatory cannot be sustained by speculation drawn from the flimsy evidence presented that the Company knew of their CIO activity if any. See *NLRB* v. *National Paper Co.*, 216 F. 2d 859, 862-3 (CA-5); *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883 (CA-1); *Tampa Times Co.* v. *NLRB*, 193 F. 2d 582 (CA-5). Unless there is a reasonable basis in the evidence for the finding of knowledge "the employer need not excuse or justify his action." *NLRB* v. *Whitin Machine Works, supra*, at page 885. See *NLRB* v. *Reynolds International Pen Co., supra*, at page 690. Accordingly, the Board's finding and order as to the discriminatory discharge of these twenty-two employees must be denied enforcement.

Support and Domination of Unions.

Substantial evidence on the record as a whole adequately supports the findings that the Company supported and fostered AFL and supported and dominated the Temporary Committee and the Independant in violation of Section 8 (a) (2) of the Act. In addition to the admission by Werner and Dyskow that they favored AFL and worked actively to defeat CIO's drive, it appears that Werner prodded AFL into action to offset the CIO attack; that the Company aided AFL by printing and distributing to its employees inflammatory anti-CIO literature most of which was distributed by company personnel at the plant gate during working hours on company time; that AFL organizers were granted access to all areas of the shop for organizational purposes, while the same privilege was expressly denied CIO; that AFL chief steward Handon was permitted to solicit dues and support for his union on Company time; that Werner suggested to AFL officials that they employ force to break up a CIO meeting and to break up the picket line, offering in each instance financial support to satisfy any liability which might be incurred for damage to property. The Company withdrew its consent to the election; it continued to recognize and deal with AFL as bargaining agent after the latter's majority status was in dispute, both before, and for a considerable period of time after, expiration of the bargaining agreement. It volunteered aid to AFL in collection of dues, by suggesting institution of a check-off arrangement, a privilege which it had previously denied.

In January, 1952, the company suggested to the AFL committee that the employees form an independent union to act as interim bargaining agent and aided in the formation of the Temporary Committee. For example, the plant loudspeaker system was made available to the Com-

mittee to announce organizational meetings; the Company newspaper was employed to publicize and support the Committee's activities; notices and propaganda literature were printed by the Company, using the personnel and facilities of its general offices. The Company premises and facilities were made available for meetings and an election to adopt the Temporary Committee, during working hours on Company time.

The employer's hand in the organization of Independent is not quite so obvious. There is, however, undisputed testimony to support the conclusion that Independent was the brain-child of the Company, in collaboration with the AFL committee. We think the finding of its support and domination is amply sustained by the evidence.

The Company, objecting to the finding that it supported the AFL, argues first, that such support as the evidence supplies constitutes merely permissible exercise of its statutory guarantee of freedom of speech. The rights of the employer in this respect must be construed in conjunction with its duty to maintain neutrality in a contest between rival unions. We said in *NLRB* v. *LaSalle Steel Co.*, 178 F. 2d 829, 835, that Section 8(c) is no more than a restatement of the principles of the First Amendment to the Constitution. See *NLRB* v. *Kropp Forge Co.*, 178 F. 2d 822, 823-27, cert. denied 340 U. S. 810 (CA-7). As we held, to construe Section 8(c) so as to permit, under the guise of free speech, acts which otherwise would be coercive or unlawful "would nullify the guaranty of employees' freedom of action and choice which Section 7 of the Act expressly provides." 178 F. 2d at page 829. The free speech provisions cannot extend to such activities as were here committed in furtherance of keeping AFL as bargaining agent, for the Company's actions far exceeded the mere expression of a preference and ignored the requirement that the employer maintain neutrality with

respect to contesting unions. See e. g., *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33; *NLRB* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163 (CA-7); *Harrison Sheet Steel Co.* v. *NLRB*, 194 F. 2d 407, 410 (CA-7); *NLRB* v. *Kropp Forge Co.*, 178 F. 2d 822, 823-27, cert. denied 340 U. S. 810 (CA-7).

The Company's further insistence that this finding is refuted by its express declaration of neutrality is unconvincing, for its action, through Werner and other supervisory personnel, wholly belies the statement, which we must consider in the light of facts which the record as a whole supports, *NLRB* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9 (CA-8). Mere "lip service to the policy and purposes of the Act is not sufficient." *Ibid* at page 13. See also *Magnolia Petroleum Co.* v. *NLRB*, 200 F. 2d 148, 150 (CA-5).

Equally wanting in merit, is the argument that the Company's acts in support of AFL were permissible activity to protect its rights under the contract with that union. Inasmuch as grievance, arbitration and other procedures cannot oust the Board's jurisdiction, *NLRB* v. *International Union, etc.*, 194 F. 2d 698, 702 (CA-7), activities within the realm of unfair labor practices can never qualify as contract rights entitled to protection. Indeed there is no contract right which the Company's activities at issue herein were designed to protect, unless the employer is attempting to assert a contract right to maintain AFL as the bargaining agent for its employees. Obviously, such a position is fatally inconsistent with the employees' right to reperesentation by a bargaining agent of their own choice. This part of the order must be enforced.

Interference, Coercion and Intimidation.

The Board found, and substantial evidence supports the finding, that during the course of the organizational cam-

paign, the Company's supervisory personnel interrogated employees about their union activities, instructed employees to remove CIO stickers and buttons from their persons and from plant property while they, in some cases, were themselves wearing AFL insignia, that it threatened employees with discharge, added work-loads or other reprisals because of support of the CIO, instituted surveillance of the employees' union activities, offered financial gains to employees in the form of 10 hours' pay for 9 hours' work, offered its employees increased benefits in the form of a profit-sharing plan and wage increases, at a time when the question of representation was pending, and compelled returning strikers to condition their reinstatement upon removal of their CIO buttons, upon refraining from CIO activity and upon forfeiting seniority. The evidence on this phase of the case is not largely in dispute and, even in cases where conflict exists, we cannot say that the Board's findings are not substantially supported by credible evidence.

The Company relies, as to the finding of interrogation and surveillance, on its contention that these activities are permissible under the free-speech guaranty. It contends that reasonable interrogation is permissible and that an employer is entitled to institute reasonable surveillance to keep himself informed as to what is going on in his plant. We may accept these contentions as correct statements of the law, assuming that such activities are so conducted as not to be intimidating or coercive. Thus, the Board has recently held that an employer may legally interrogate his employees as to their union membership in order to inform himself as to the validity of a union's claim of majority support. *Blue Flash Express, Inc.*, 109 NLRB No. 85. However, as the Board said, the object of interrogation must be within the law and an employer acts at his peril, lest his investigation become tainted and

coercive when considered in conjunction with other activities which reveal a departure from strict neutrality.

We are not here concerned with whether each of the activities found to exist if standing alone, would be coercive. Our language in *NLRB* v. *Kropp Forge Co.*, 178 F. 2d at pages 828-9, is pertinent: "It * * * seems clear to us that in considering whether such statements or expressions are protected by Section 8 (c) of the Act, they cannot be considered as isolated words cut off from the relevant circumstances and background in which they are spoken. A statement * * * might seem perfectly innocent * * *, including neither a threat nor a promise. But, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his employees' freedom of choice and action. * * *. If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice."

We believe the record before us demonstrates a general pattern and course of conduct on the part of the Company to discourage the employees in their right to choose, beginning with the discharge of Gould and Steffes and continuing until some time after the end of the strike in June 1951 and the apparent defeat of the CIO drive. Although, some findings of unfair practice under this heading, notably that of surveillance, rest almost solely on inference, when considered as a part of that general pattern of conduct, we think the Board was justified in finding the practices coercive.

Discrimination Subsequent to the Strike.

Whether the discharge and refusal to reinstate the fifty-seven strikers and the constructive discharge of three others by conditioning their reinstatement upon loss of seniority were discriminatory depends on whether the *strike was a protected activity.* If it was, the discharges and refusals to reinstate were unlawful. In stamping these discharges unlawful, the Board rejected the Company's defense that the strike was unprotected because it was in violation of the no-strike clause of the AFL contract and in violation of Section 8(d) of the Act, 29 U. S. C. A. § 158 (d).

Section 13 of the contract established a procedure to settle grievances "involving the meaning, application or interpretation of this agreement." Section 14 provided for arbitration of any dispute "which has not been satisfactorily settled" by employing section 13 procedures, but that "the authority of the arbitrator shall be limited to the interpretation and application of the express terms of this agreement." Section 15 provided that "(A). The Company and the Union agree that the grievance procedure provided herein is adequate to provide a fair and final determination of all grievances that may properly arise *under the terms of this agreement,* and shall be the sole means of disposing of grievances. It is the desire of the Company and the Union to avoid strikes and work stoppages and lock-outs. (B) The Union agrees that neither it nor its members, individually or collectively, will, during the term of this agreement, cause, permit, approve or take part in any strike * * * except for the refusal of the Company to arbitrate in accordance with Section 14 or * * * to abide by the award of the Arbitrator." (Emphasis supplied.)

The Company contends that the word "strike" means

any strike for whatever cause. This contention, it seems to us, erroneously assumes that the language of section 15 (B) must be read alone without relation to other provisions of the contract. The "no-strike" clause must be interpreted in the light of other terms of the contract. The agreement covers rates of pay and working conditions, and its remedial provisions do not purport to extend beyond that. Thus, as we have observed, the grievance procedure is expressly designed to settle disputes over the "meaning, application or interpretation of this agreement"; the arbitration provision is expressly limited "to the interpretation and application of the express terms of this agreement"; the policy statement of the parties, which forms a basis for the "no-strike" and "no-lockout" clauses, is an agreement that such procedures are adequate "to provide a fair determination of all grievances which may properly arise under the terms of this agreement." The no-strike clause which follows immediately after this statement must be construed, as equally restricted *i. e.*, as a surrender of the right to require a change in the contract or as a means of settling any dispute which is embraced by its terms. Since the contract does not purport to reach all conceivable phases of employer-employee relations, this clause can not well be interpreted as a surrender of the right of self-help, as a measure to protest against unfair labor practices.

Substantial evidence supports the Board's finding that the strike was motivated by the Company's unfair labor practices. Indeed, the record suggests that this resort to self-help was directed against a continuing course of conduct on the part of the Company which was in flagrant disobedience to the statutory mandate. The Court of Appeals for the Second Circuit has recently had occasion to consider the contentions here raised in a strikingly similar situation. The Court said, "The right of employees

to strike in resistance to unfair labor practices by the employer is a fundamental one which the statute recognizes and no contractual waiver of that right is to be inferred from general provisions in a collective bargaining contract which do not make it clear that strikes caused by the employer's unfair labor practices were included in the prohibition." *NLRB* v. *Mastro Plastics Corp.*, 214 F. 2d 462, 464-465, cert. granted January 10, 1955. We find no authority conflicting with the rule stated.

Cases cited by the Company fall largely into two categories, exemplified by two decisions of this court. In *NLRB* v. *Columbian E. & S. Co.*, 96 F. 2d 948, aff'd 306 U. S. 292, we refused enforcement of an order to reinstate certain discharged striking employees on the ground that their strike was in violation of a no-strike clause in a contract with Columbian. There, however, the strike was called by the bargaining representative to force the employer to accede to its demands that an existing contract be amended by the addition thereto of a closed shop provision. The other type is illustrated by our decision in *United Biscuit Co.* v. *NLRB*, 128 F. 2d 771, where various units of United's employees were represented by three separate local unions, including Locals 431 and 264. Local 431 called a strike against practices which United conceded were invalid under the Act. When the employees in Local 431 went out, the officials of Local 264 called a strike in violation of a no-strike clause in its bargaining agreement with the employer. We denied enforcement of so much of the Board's order as required reinstatement of certain Local 264 employees who had been refused reinstatement after the strike, holding that theirs was a sympathy strike, not one directed againts any unfair practice which affected employees of that local. Other cases cited by the Company fit roughly into one or the other of these categories, which,

obviously, are to be distinguished on their facts from the case before us.

We agree that an unfair labor practice strike is not within the proscription of the provisions of Section 8(d). Section 8(d) (4) requires any party to a bargaining contract who desires to terminate or modify the same to continue "all the terms and condition of" such contract "in full force and effect without resorting to strike or lockout for a period of sixty days after [notice of termination is given] or until the expiration date of such contract, whichever occurs later." (29 U. S. C. A. § 158 (d)(4). This section we have interpreted as providing an orderly method for the modification or termination of existing agreements by proscribing, during the sixty day cooling off period, strikes which interfere with the operation of the statutory method, *i. e.*, strikes to compel termination of the agreement or modification of its terms. That section has no application to a strike caused by an employer's unfair labor practices, in no way concerned with questions of termination or modification of the existing agreement. *NLRB* v. *Mastro Plastics Corp.*, 214 F. 2d at pages 465-6 (CA-2), distinguishing *Local No. 3, etc. v. NLRB*, 210 F. 2d 325 (CA-8).

The Company's argument that this controversy involves only a dispute between itself and CIO is an oversimplification of the issue. If it were true that the controversy involves only the Company, the AFL and the CIO as legal entities, there might be some justification for a rule which would *permit a fight to the finish without interference.* But here it appears that this dispute was touched off by widespread employee dissatisfaction with their representation by AFL. And CIO was not reluctant to step in and capitalize the situation. However, the statute guarantees to employees the right to select their own bargaining agent and, as previously pointed out, this sanction inherently in-

cludes the right to change bargaining agents by lawful methods without the employees thereby subjecting themselves to coercive acts on the part of the employer. The fate of the employees in such a situation is, indeed, a dire one, if each of the three interested parties is entitled to ignore the statute and to direct his actions accordingly in the promotion of his selfish interests at the employees' expense. That, in the final analysis, is the full scope of the Company's contention. CIO appeared on the scene at the behest of employees. There is no substantial evidence that the campaign was marked by unprotected activities on the part of CIO adherents, unless the strike is to be placed in that category. If the practice of raiding by rival unions needs control, that is a subject for legislative attention, not judicial. It certainly is not for an individual employer to determine for itself how to meet what it considers the exigencies of each individual case. We conclude that the Board was amply justified in holding that the June 20 strike was a protected concerted activity caused by respondent's unfair labor practices.

Bias.

The record does not support the Company's assertion that the Examiner was so biased as to render the order invalid. The principal contention in this respect is that the Examiner discredited all of the Company's witnesses and credited all those called by the General Counsel. This fact, if it had been the fact, would not of itself prove bias. *NLRB* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 658-60. Furthermore, in instances where the General Counsel's witnesses were credited over Company witnesses, the question was essentially one of credibility which cannot be disturbed unless we can say that the credited witnesses could not possibly be believed. This we cannot do. Furthermore, the evidence in this respect is free from conflict on most

questions. The Company called few witnesses, relying, as it does here, on its contention that the General Counsel had not sustained his burden of proof. Thus, the Company's premises in this respect are merely reargument of the substantial evidence question in different form.

The Company raises a further question. The complaint against AFL was continued early in the proceeding before the Examiner, pending approval by the General Counsel in Washington of a settlement agreement with that union. Counsel for AFL then withdrew from the proceedings. The agreement was ultimately disapproved, and AFL reentered the case. The Company objected to this procedure. It fails, however, to show that it was prejudiced by these on again off again tactics of AFL. This manner of proceeding does not indicate bias.

Substantial evidence supports the Board's findings that employee Smejkel was discharged for cause, not for engaging in CIO activities, and that, as to the nine strikers, the General Counsel failed to prove that these men had sought and been denied reinstatement. In short, there is no evidence of record relating to the status of these men at any of the pertinent times herein.

The petition of CIO is denied.

The order against the AFL will be enforced. The order against the Company is modified by deleting the provisions requiring reinstatement of the twenty-two night shift employees, and, thus modified, will be enforced.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 381

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (CIO), PETITIONER

v.

WAGNER IRON WORKS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This memorandum is filed on behalf of the National Labor Relations Board in response to the cross-petition in the above-entitled case.

The circumstances giving rise to the cross-petition and the question presented therein are as follows:

Upon charges filed by the cross-petitioner, hereafter called the CIO, the Board on April 23, 1953, issued its Decision and Order requiring the Wagner Iron Works, hereafter called the Company, to remedy certain unfair labor practices. More specifically, the Board found that the Company had dis-

criminatorily discharged 64 striking employees, and rejected the Company's defense that these employees had forfeited their statutory protection because the strike was in breach of a no-strike commitment and in vioaltion of Section 8(d) of the Act. The Board further found that the Company had discharged 22 night shift employees to discourage CIO union activity, and rejected the Company's contention that they had been discharged for cause. Accordingly, the Board directed the Company to reinstate all of these employees.

In proceedings to enforce the Board's order, the court below affirmed all of the Board's findings except those relating to the night shift employees. With respect to the latter, the court held that "the Board did not sustain the burden of proving that these discharges were discriminatory" since the "record does not disclose the union affiliation or leanings of any of the discharged employees" and "does not support the essential finding that the Company knew of the CIO membership or leanings, real or presumed, of the discharged employees."

On June 28, 1955, the Company filed a petition for a writ of certiorari to review the lower court's judgment insofar as it enforced the Board's order. No. 185, this Term. That petition presents three questions set forth below.[1] In response thereto the

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[1] 1. Whether the "loss of status" provision of Section 8(d) of the National Labor Relations Act (which bars from the remedial processes of the Act employees who strike during

Board filed its memorandum stating that it did not oppose certiorari with respect to questions numbered one and two, because they were also presented in *Mastro Plastics Corp.* v. *National Labor Relations Board,* No. 19, this Term, in which this Court has granted certiorari, 348 U. S. 910.

The CIO's cross-petition seeks review of that portion of the lower court's judgment which denied enforcement of the Board's order with respect to the 22 night shift employees. Although the Board agrees that the court below erred in this respect, the Board did not seek certiorari because of this Court's usual practice not to review questions relating to the substantiality of evidence supporting Board findings. For that reason and for the further reason that the question affecting these employees was unrelated to, and severable from, the questions presented in the Company's petition, the Board did not cross-petition for certiorari to review the judgment relating to the night shift employees.

If this Court grants the Company's petition for certiorari and, in the circumstances, deems it appropriate to review the judgment of the court

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the "cooling-off" period preceding termination of a collective bargaining contract) applies to "unfair labor practice" strikers who strike during the "cooling-off" period.

2. Whether employees discharged for breaching a covenant in their collective bargaining contract prohibiting "any strike," by striking during the term of the contract, may be ordered reinstated by the National Labor Relations Board.

3. Whether the National Labor Relations Board may order reinstatement of strikers whose contract of employment provided that the contract grievance and arbitration procedure *"shall be the sole means of disposing of grievances."*

below with respect to the night shift employees, the Board will join the CIO in urging reversal of that portion of the judgment.[2]

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
National Labor Relations Board.

OCTOBER, 1955.

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[2] There may be some question as to the standing of the CIO to cross-petition for a writ of certiorari. The facts relating to this point may be summarized as follows: The Board in its Decision and Order dismissed the complaint against the Company insofar as it alleged the unlawful discharges of ten other employees. After the Board petitioned the court below for enforcement of the portion of its order which sustained the complaint, the CIO petitioned that court to review that part of the order dismissing the complaint in part. The Board subsequently moved the court below to consolidate the two proceedings "for all purposes" on the ground that such consolidation "would conserve the court's time as well as the time of the parties by enabling the Board to consolidate into a single brief" the two briefs which it would otherwise be required to file, and "would materially reduce the printing expenses by enabling the Board to file a single consolidated appendix." The court below ordered the two causes to be consolidated "for all purposes."

It is not clear from this order whether the court below intended to consolidate the causes merely for purposes of filing consolidated briefs and appendices, or whether the order had the additional purpose of making the CIO a party to the enforcement proceeding brought by the Board. If the order is interpreted as having the effect of making the CIO such a party, its standing to petition for certiorari is clear. Cf. *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-339.

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